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ELEMENTS

OF

INTERNATIONAL LAW.

BY

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Second English Edition,

EDITED WITH NOTES, AND AN APPENDIX OF STATUTES AND TREATIES, BRINGING THE WORK DOWN TO THE PRESENT TIME.

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LONDON:
STEVENS & SONS, 119, CHANCERY LANE,
Law Publishers and Booksellers.
1880.

341
W558

LONDON:
BRADBURY, AGNEW, & CO., PRINTERS, WHITEFRIARS.

3239

PREFACE TO SECOND ENGLISH EDITION.

As a comparatively short time has elapsed since the first English Edition was published, no great amount of alteration has been necessary in the second. The settlement of the affairs of Eastern Europe being the most important event of recent times, as regards International Law, the Treaty of Berlin, and other important State Papers bearing on that settlement, have been printed in full in the Appendix.

A. C. BOYD.

3, Harcourt Buildings, Temple.
January, 1880.

PREFACE TO FIRST ENGLISH EDITION.

WHEATON'S "Elements of International Law" was first published in 1836, in two editions, one appearing in Philadelphia, and the other in London. The third edition came out in 1846, in Philadelphia. In 1848, a French edition of the work was published at Leipsic and Paris; and in 1853 a second French edition was brought out at the same places. In 1857, an edition in English (called the sixth) was edited by Mr. W. B. Lawrence, and published at Boston. A second edition, by the same editor, appeared in 1863. The next edition, published in 1864, was a translation of the work into Chinese, and was executed by order of the Chinese Government. The edition after that was edited by Mr. R. H. Dana, and appeared in 1866; and since that time, there being no other edition in the English language, the work has been long out of print. The present edition was undertaken at the suggestion of the publishers, there being no apparent probability of any new edition being brought out, either in England or America. The great value of Mr. Wheaton's treatise, and the importance of international law at the present moment, must be its justification.

The original text of the author having, as Mr. Dana says in his preface, "become, by the death of Mr. Wheaton, unalterable," it is here reproduced as left by him, and the numbering of the sections

adopted by Mr. Dana has been preserved for the sake of convenience. The notes of the present edition are entirely original, and are not taken from those of any previous edition. It has of course been necessary to refer to many of the same events and judicial decisions discussed by the previous editors, and without this the work would have been utterly incomplete; but, where their notes have been used, reference is made to them as to any other work.

The notes to this edition are interspersed throughout the text, but, being printed in a different type, the reader can have no difficulty in distinguishing the original work from that for which the present editor is responsible. All footnotes added to this edition are enclosed in brackets. A new Appendix has been added, containing the English and American statute law of Naturalization, Extradition, and Foreign Enlistment; the English Naval Prize Act, the Treaty of Washington, and extracts from the most important treaties relating to the Black Sea, the Dardanelles, and Bosphorus, and Turkish affairs, which are now so prominently before the public. An entirely new and full Index has been compiled, by which it is hoped that anything in the work may be readily found.

It has been the aim of the present editor to bring the work down to the present time, by recording in the notes the most important diplomatic transactions; the leading decisions of English, American, and Continental Courts; and the opinions of the most eminent publicists which have appeared since the date of the last edition issued by the author himself. For this purpose the English parliamentary papers and law reports, the American diplomatic

correspondence and the decisions of the Supreme and other Courts of the United States, the writings of the most eminent modern authors on the subject, and other authoritative sources of international law have been consulted, and referred to throughout.

The editor begs to acknowledge the debt of gratitude which he owes to Mr. Hertslet for the publication of his "Map of Europe by Treaty," the use of which has immensely facilitated his labours.

In cases where the interests of England and America have been in conflict, the editor has endeavoured, and hopes he has succeeded, in taking an impartial view of the controversy; and he also ventures to hope that this edition may be as useful to Americans as to Englishmen.

The editor has also endeavoured to keep the work within the smallest limits consistent with anything like completeness, and if the reader should be of opinion that important topics have either been omitted or been dealt with too shortly, it is hoped that this may be partially excused by the accessible form in which the work is presented. The editor also pleads the difficulty of selecting the most important points from the immense mass of materials furnished by recent times, as an excuse for any omissions. For those who may wish to pursue any particular topic further, the references in the footnotes have been made as full as possible.

In conclusion, it is hoped that the undoubted value of Mr. Wheaton's work will compensate those who read it for the shortcomings of the additions to it.

A. C. BOYD.

3, Harcourt Buildings, Temple,
9th February, 1878.

ADVERTISEMENT TO THE FIRST EDITION.

THE object of the Author in the following attempt to collect the rules and principles which govern, or are supposed to govern, the conduct of States, in their mutual intercourse in peace and in war, and which have therefore received the name of International Law, has been to compile an elementary work for the use of persons engaged in diplomatic and other forms of public life, rather than for mere technical lawyers, although he ventures to hope that it may not be found entirely useless even to the latter. The great body of the rules and principles which compose this law is commonly deduced from examples of what has occurred or been decided, in the practice and intercourse of nations. These examples have been greatly multiplied in number and interest during the long period which has elapsed since the publication of Vattel's highly appreciated work; a portion of human history abounding in fearful transgressions of that law of nations which is supposed to be founded on the higher sanction of the natural law (more properly called the law of God), and at the same time rich in instructive discussions in cabinets, courts of justice, and legislative assemblies, respecting the nature and extent of the obligations between independent societies of men called States. The principal aim of the Author has been to glean from these sources the general principles which may fairly be considered to have received the assent of most civilized and Christian nations, if not as invariable rules of conduct, at least as rules

which they cannot disregard without general obloquy and the hazard of provoking the hostility of other communities who may be injured by their violation. Experience shows that these motives, even in the worst times, do really afford a considerable security for the observance of justice between States, if they do not furnish that perfect sanction annexed by the lawgiver to the observance of the municipal code of any particular State. The knowledge of this science has, consequently, been justly regarded as of the highest importance to all who take an interest in political affairs. The Author cherishes the hope that the following attempt to illustrate it will be received with indulgence, if not with favour, by those who know the difficulties of the undertaking.

BERLIN, *January* 1, 1836.

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ELEMENTS OF INTERNATIONAL LAW.

PART FIRST.

DEFINITION, SOURCES, AND SUBJECTS OF INTERNATIONAL LAW.

CHAPTER I.

DEFINITION AND SOURCES OF INTERNATIONAL LAW.

§ 1. Origin of International Law.

THERE is no legislative or judicial authority, recognised by all nations, which determines the law that régulates the reciprocal relations of States. The origin of this law must be sought in the principles of justice, applicable to those relations. While in every civil society or State there is always a legislative power which establishes, by express declaration, the civil law of that State, and a judicial power which interprets that law, and applies it to individual cases, in the great society of nations there is no legislative power, and consequently there are no express laws, except those which result from the conventions which States may make with one another. As nations acknowledge no superior, as they have not organised any common paramount authority, for the purpose of establishing by an express declaration their international law, and as they have not constituted any sort of Amphictyonic magistracy to interpret and apply that law, it is impossible that there should be a code of international law illustrated by judicial interpretations.

The inquiry must then be, what are the principles of justice which ought to regulate the mutual relations of nations, that is to say, from what authority is international law derived?

When the question is thus stated, every publicist will decide it according to his own views, and hence the fundamental differences which we remark in their writings.

§ 2. Natural Law defined.

The leading object of Grotius, and of his immediate disciples and successors, in the science of which he was the founder, seems to have been, *First*, to lay down those rules of justice which would be binding on men living in a social state, independently of any positive laws of human institution; or, as is commonly expressed, living together in *a state of nature*; and,

Secondly, To apply those rules under the name of Natural Law, to the mutual relations of separate communities living in a similar state with respect to each other.

With a view to the first of these objects, Grotius sets out in his work, on the rights of war and peace, (*de jure belli ac pacis*,) with refuting the doctrine of those ancient sophists who wholly denied the reality of moral distinctions, and that of some modern theologians, who asserted that these distinctions are created entirely by the arbitrary and revealed will of God, in the same manner as certain political writers (such as Hobbes) afterwards referred them to the positive institution of the civil magistrate. For this purpose, Grotius labours to show that there is a law audible in the voice of conscience, enjoining some actions, and forbidding others, according to their respective suitableness or repugnance to the reasonable and sociable nature of man. "Natural law," says he, "is the dictate of right reason pronouncing that there is in some actions a moral obligation, and in other actions a moral deformity, arising from their respective suitableness or repugnance to the rational and social nature, and that, consequently, such actions are either forbidden or enjoined by God, the Author of nature. Actions which are the subject of this exertion of reason, are in themselves lawful or unlawful, and are, therefore, as such necessarily commanded or prohibited by God" (*a*).

(*a*) "Jus naturale est dictatum rectæ rationis, indicans actui alicui, ex ejus convenientiâ aut disconvenientiâ cum ipsâ naturâ rationali, inesse moralem

The term Natural Law is here evidently used for those rules of justice which ought to govern the conduct of men, as moral and accountable beings, living in a social state, independently of positive human institutions, (or, as is commonly expressed, living in a state of nature,) and which may more properly be called the law of God, or the divine law, being the rule of conduct prescribed by Him to his rational creatures, and revealed by the light of reason, or the Sacred Scriptures.

§ 3. Natural Law identical with the law of God, or Divine Law.

As independent communities acknowledge no common superior, they may be considered as living in a state of nature with respect to each other: and the obvious inference drawn by the disciples and successors of Grotius was, that the disputes arising among these independent communities must be determined by what they call the Law of Nature. This gave rise to a new and separate branch of the science, called the Law of Nations, *Jus Gentium* (*b*).

Natural Law applied to the intercourse of States.

Grotius distinguished the law of nations from the natural law by the different nature of its origin and obligation, which he attributed to the general consent of nations. In the introduction to his great work, he says, "I have used in favour of this law, the testimony of philosophers, historians, poets, and even of orators; not that they are indiscriminately to be relied on as impartial authority; since they often bend to the prejudices of their respective sects, the nature of their argument, or the interest of their cause; but because where many minds of different ages and countries concur in the same sentiment, it must be referred to some general cause. In the subject now in question, this cause must be either a just deduction from the principles of natural justice, or universal consent. The first discovers to us the natural law, the second the law of nations. In order to distinguish these two branches of the same science, we must consider, not merely the terms which authors have used to define them, (for they often confound the terms *natural law* and *law of nations*,)

§ 4. Law of Nations distinguished from Natural Law, by Grotius.

turpitudinem, aut necessitatem moralem, ac consequenter ab auctore naturæ, Deo, talem actum aut vetari aut præcipi.

"Actus de quibus tale extat dictatum, debiti sunt aut illiciti per se, atque ideo à Deo necessario præcepti aut vetiti intelliguntur." Grotius, de Jur Bel. ac Pac. lib. i. cap. 1, § x. 1, 2.

(*b*) [With respect to the *jus gentium* as understood by the Romans, see Maine's Ancient Law, ch. iii, p. 1*i*.]

but the nature of the subject in question. For if a certain maxim which cannot be fairly inferred from admitted principles is, nevertheless, found to be everywhere observed, there is reason to conclude that it derives its origin from positive institution." He had previously said, "As the laws of each particular State are designed to promote its advantage, the consent of all, or at least the greater number of States, may have produced certain laws between them. And, in fact, it appears that such laws have been established, tending to promote the utility, not of any particular State, but of the great body of these communities. This is what is termed the Law of Nations, when it is distinguished from Natural Law" (*c*).

All the reasonings of Grotius rest on the distinction, which he makes between the natural and the positive or voluntary Law of Nations. He derives the first element of the Law of Nations from a supposed condition of society, where men live together in what has been called a state of nature. That natural society has no other superior but God, no other code than the divine law engraved in the heart of man, and announced by the voice of conscience. Nations living together in such a state of mutual independence must necessarily be governed by this same law. Grotius, in demonstrating the accuracy of his somewhat obscure definition of Natural Law, has given proof of a vast erudition, as well as put us in possession of all the sources of his knowledge. He then bases the positive or voluntary Law of Nations on the consent of all nations, or of the greater part of them, to observe certain rules of conduct in their reciprocal relations. He has en-

(*c*) "Usus sum etiam ad juris hujus probationem testimoniis philosophorum, historicorum, poetarum, postremò et oratorum; non quod illis indiscretè credendum sit; solent enim sectæ, argumento, causæ servire: sed quòd ubi multi diversis temporibus ac locis idem pro certo affirmant, id ad causam universalem referri debeat; quæ in nostris quæstionibus alia esse non potest quàm aut recta illatio ex naturæ principiis procedens, aut communis aliquis consensus. Illa jus naturæ indicat, hic jus gentium: quorum discrimen non quidem ex ipsis testimoniis, (passim enim scriptores voce *juris naturæ*, et *gentium* permiscent,) sed ex materiæ qualitate intelligendum est. Quod enim ex certis principiis certâ argumentatione deduci non potest, et tamen ubique observatum apparet, sequitur ut ex voluntate liberâ ortum habeat." * * * * * "Sed sicut cujusque civitatis jura utilitatem suæ civitatis respiciunt, ita inter civitates aut omnes aut plerasque ex consensu jura quædam nasci potuerunt; et nata apparent, quæ utilitatem respicerent non cœtuum singulorum sed magnæ illius universitatis. Et hoc jus est quod gentium dicitur, quotiens id nomen à jure naturali distinguimus." Grotius, de Jur. Bel. ac Pac. Prolegom. 40, 17.

deavoured to demonstrate the existence of these rules by invoking the same authorities, as in the case of his definition of Natural Law. We thus see on what fictions or hypotheses Grotius has founded the whole Law of Nations. But it is evident that his supposed state of nature has never existed. As to the general consent of nations of which he speaks, it can at most be considered a tacit consent, like the *jus non scriptum quod consensus facit* of the Roman jurisconsults. This consent can only be established by the disposition, more or less uniform, of nations to observe among themselves the rules of international justice, recognised by the publicists. Grotius would, undoubtedly, have done better had he sought the origin of the Natural Law of Nations in the principle of utility, vaguely indicated by Leibnitz (*d*), but clearly expressed and adopted by Cumberland (*e*), and admitted by almost all subsequent writers, as the test of international morality (*f*). But in the time that Grotius wrote, this principle which has so greatly contributed to dispel the mist with which the foundations of the science of International Law were obscured, was but very little understood. The principles and details of international morality, as distinguished from international law, are to be obtained not by applying to nations the rules which ought to govern the conduct of individuals, but by ascertaining what are the rules of international conduct which, on the whole, best promote the general happiness of mankind. The means of this inquiry are observation and meditation; the one furnishing us with facts, the other enabling us to discover the connection of these facts as causes and effects, and to predict the results which will follow, whenever similar causes are again put into operation (*g*).

§ 5. Law of Nature and

Neither Hobbes nor Puffendorf entertains the same opinion as Grotius upon the origin and obligatory force of the positive

(*d*) Et jus quidem merum sive strictum nascitur ex principio servandæ pacis; æquitas sive caritas ad majus aliquid contendit, ut dum quisque alteri prodest quantum potest, felicitatem suam augeat in aliena; et ut verbo dicam, jus strictum miseriam vitat, jus superius ad felicitatem tendit, sed qualis in hanc mortalitatem cadit. Leibnitz, de Usu Actorum Publicorum, § 13.

(*e*) Lex naturæ est propositio naturaliter cognita, actiones indicans effectrices communis boni. Cumberland, de Legibus Naturæ, cap. v. § 1.

(*f*) Bentham's Principles of International Law. Works, Part VIII. p. 537. Edit. Bowring.

(*g*) Senior, Edinburgh Review, No. 156, p. 310, 311.

Law of Nations asserted to be identical, by Hobbes and Puffendorf.

Law of Nations. The former, in his work, *De Cive*, says, "The natural law may be divided into the natural law of men, and the natural law of States, commonly called the Law of Nations. The precepts of both are the same; but since States, when they are once instituted, assume the personal qualities of individual men, that law, which when speaking of individual men we call the Law of Nature, is called the Law of Nations when applied to whole States, nations, or people" (*h*). To this opinion Puffendorf implicitly subscribes, declaring that "there is no other voluntary or positive law of nations properly invested with a true and legal force, and binding as the command of a superior power" (*i*).

After thus denying that there is any positive or voluntary law of nations founded on the consent of nations, and distinguished from the natural law of nations, Puffendorf proceeds to qualify this opinion by admitting that the usages and comity of civilized nations have introduced certain rules for mitigating the exercise of hostilities between them; that these rules are founded upon a general tacit consent; and that their obligation ceases by the express declaration of any party engaged *in a just war*, that it will no longer be bound by them. There can be no doubt that any belligerent nation which chooses to withdraw itself from the obligation of the Law of Nations, in respect to the manner of carrying on war against another State, *may* do so at the risk of incurring the penalty of vindictive retaliation on the part of other nations, and of putting itself in general hostility with the civilized world. As a celebrated English civilian and magistrate (Lord Stowell) has well observed, "a great part of the law of nations stands upon the usage and practice of nations. It is introduced, indeed, by general principles, but it travels with those general principles only to a certain extent; and if it stops there, you are not at liberty to go further, and say that mere general speculations would bear you out in a further progress;

(*h*) Præcepta utriusque eadem sunt; sed quia civitates semel institutæ inducunt proprietates hominum personales, lex quam, loquentes de hominum singulorum officio, naturalem dicimus, applicata totis civitatibus, nationibus sive gentibus, vocatur jus gentium. Hobbes, De Cive, cap. xiv. § 4.

(*i*) Cui sententiæ et nos plane subscribimus. Nec præterea aliud jus gentium, voluntarium seu positivum dari arbitramus, quod quidem legis propriæ dictæ vim habeat, quæ gentes tanquam a superiore profecta stringat. Puffendorf, De Jure Naturæ et Gentium, lib. ii. cap. 3, § 23.

thus, for instance, on mere general principles, it is lawful to destroy your enemy; and mere general principles make no great difference as to the manner by which this is to be effected; but the conventional law of mankind, which is evidenced in their practice, does make a distinction, and allows some, and prohibits other modes of destruction; and a belligerent is bound to confine himself to those modes which the common practice of mankind has employed, and to relinquish those which the same practice has not brought within the ordinary exercise of war, however sanctioned by its principles and purposes" (*k*).

The same remark may be made as to what Puffendorf says respecting the privileges of ambassadors, which Grotius supposes to depend upon the voluntary law of nations; whilst Puffendorf says they depend, either upon natural law, which gives to public ministers a sacred and inviolable character, or upon tacit consent, as evidenced in the usage of nations, conferring upon them certain privileges which may be withheld at the pleasure of the State where they reside. The distinction here made between those privileges of ambassadors, which depend upon natural law, and those which depend upon custom and usage, is wholly groundless; since both one and the other may be disregarded by any State which chooses to incur the risk of retaliation or hostility, these being the only sanctions by which the duties of international law can be enforced.

Still it is not the less true that the law of nations, founded upon usage, considers an ambassador, duly received in another State, as exempt from the local jurisdiction by the consent of that State, which consent cannot be withdrawn without incurring the risk of retaliation, or of provoking hostilities on the part of the sovereign by whom he is delegated. The same thing may be affirmed of all the usages which constitute the Law of Nations. They may be disregarded by those who choose to declare themselves absolved from the obligation of that law, and to incur the risk of retaliation from the party specially injured by its violation, or of the general hostility of mankind (*l*).

(*k*) *The Plad Oren*, 1 C. Rob 140.
(*l*) Wheaton's History of the Law of Nations, p. 96

§ 6. Law of Nations derived from reason and usage by Bynkershoek.

Bynkershoek (who wrote after Puffendorf, and before Wolf and Vattel,) derives the law of nations from reason and usage (*ex ratione et usu*,) and founds usage on the evidence of treaties and ordinances (*pacta et edicta*,) with the comparison of examples frequently recurring. In treating of the rights of neutral navigation in time of war, he says, "Reason commands me to be equally friendly to two of my friends who are enemies to each other; and hence it follows that I am not to prefer either in war. Usage is shown by the constant, and, as it were, perpetual custom which sovereigns have observed of making treaties and ordinances upon this subject, for they have often made such regulations by treaties to be carried into effect in case of war, and by laws enacted after the commencement of hostilities. I have said *by, as it were, a perpetual custom;* because one, or perhaps two treaties, which vary from the general usage, do not alter the law of nations" (*m*).

In treating of the question as to the competent judicature in cases affecting ambassadors, he says, "The ancient jurisconsults assert, that the law of nations is that which is observed in accordance with the light of reason, between nations, if not among all, at least certainly among the greater part, and those the most civilized. According to my opinion, we may safely follow this definition, which establishes two distinct bases of this law; namely, reason and custom. But in whatever manner we may define the law of nations, and however we may argue upon it, we must come at last to this conclusion, that what reason dictates to nations, and what nations observe between each other, as a consequence of the collation of cases frequently recurring, is the only law of those who are not governed by any other—(*unicum jus sit eorum, qui alio jure non reguntur*). If all men are men, that is to say, if they make use of their reason, it must counsel and command them certain things which they ought to observe as if by mutual consent, and which being afterwards established by

(*m*) "Jus Gentium commune in hanc rem non aliunde licet discere, quàm ex ratione et usu. Ratio jubet ut duobus, invicem hostibus, sed mihi amicis, æque amicus sim; et inde efficitur, ne in causâ belli alterum alteri præferam. Usus intelligitur ex perpetuâ quodammodo paciscendi edicendique consuetudine; pactis enim Principes sæpe id egerunt in casu belli, sæpe etiam edictis contra quoscunque, flagrante jam bello. Dixi, *ex perpetuâ quodammodo consuetudine*, quia unum fortè alterumve pactum, quod a consuetudine recedit, Jus Gentium non mutat." Bynkershoek, Quæst. Jur. Pub. lib. i. cap. 10.

usage, impose upon nations a reciprocal obligation; without which law, we can neither conceive of war, nor peace, nor alliances, nor embassies, nor commerce" (*n*). Again, he says, treating the same question: "The Roman and pontifical law can hardly furnish a light to guide our steps; the entire question must be determined by reason and the usage of nations. I have alleged whatever reason can adduce for or against the question; but we must now see what usage has approved, for that must prevail, since the law of nations is thence derived" (*o*). In a subsequent passage of the same treatise, he says, "It is nevertheless most true, that the States General of Holland alleged, in 1651, that, according to the law of nations, an ambassador cannot be arrested, though guilty of a criminal offence; and equity requires that we should observe that rule, unless we have previously renounced it. The law of nations is only a presumption founded upon usage, and every such presumption ceases the moment the will of the party who is affected by it is expressed to the contrary. Huberus asserts that ambassadors cannot acquire or preserve their rights by prescription; but he confines this to the case of subjects who seek an asylum in the house of a foreign minister, against the will of their own sovereign. I hold the rule to be general as to every privilege of ambassadors, and that there is no one they can pretend to enjoy against the express declaration of the sovereign, because an express dissent excludes the supposition of a tacit consent, and there is no law of nations except between those who voluntarily submit to it by tacit convention" (*p*).

§ 7. System of Wolf.

The public jurists of the school of Puffendorf had considered the science of international law as a branch of the science of ethics. They had considered it as the natural law of individuals applied to regulate the conduct of independent societies of men, called States. To Wolf belongs, according to Vattel, the credit of separating the law of nations from that part of natural jurisprudence which treats of the duties of individuals.

In the preface of his great work, he says, "That since such is the condition of mankind that the strict law of nature can-

(*n*) De Foro Legatorum, cap. iii. § 10.
(*o*) Ibid., cap. vii. § 8.
(*p*) Ibid., cap. xix. § 6.

not always be applied to the government of a particular community, but it becomes necessary to resort to laws of positive institution more or less varying from the natural law, so in the great society of nations it becomes necessary to establish a law of positive institution more or less varying from the natural law of nations. As the common welfare of nations requires this mutation, they are not less bound to submit to the law which flows from it than they are bound to submit to the natural law itself, and the new law thus introduced, so far as it does not conflict with the natural law, ought to be considered as the common law of all nations. This law we have deemed proper to term, with Grotius, though in a somewhat stricter sense, the voluntary Law of Nations" (*q*).

Wolf afterwards says, that "the voluntary law of nations derives its force from the presumed consent of nations, the conventional from their express consent; and the consuetudinary from their tacit consent" (*r*).

This presumed consent of nations (*consentium gentium præsumptum*) to the voluntary law of nations he derives from the fiction of a great commonwealth of nations (*civitate gentium maxima*) instituted by nature herself, and of which all the nations of the world are members. As each separate society of men is governed by its peculiar laws freely adopted by itself, so is the general society of nations governed by its appropriate laws freely adopted by the several members, on their entering the same. These laws he deduces from a modification of the natural law, so as to adapt it to the peculiar nature of that social union, which, according to him, makes it the duty of all nations to submit to the rules by which that union is governed, in the same manner as individuals are bound to submit to the laws of the particular community of which they are members. But he takes no pains to prove the existence of any such social union or universal republic of nations, or to show when and how all the human race became members of this union or citizens of this republic.

§ 8. Differences of opinion

Wolf differs from Grotius, as to the origin of the voluntary law of nations in two particulars:

(*q*) Wolfius, Jus Gentium, Pref. § 3.
(*r*) Wolfius, Proleg. § 25.

between Grotius and Wolf on the origin of the voluntary Law of Nations.

1. Grotius considers it as a law of positive institution, and rests its obligation upon the general consent of nations, as evidenced in their practice. Wolf, on the other hand, considers it as a law which nature has imposed upon all mankind as a necessary consequence of their social union; and to which no one nation is at liberty to refuse its assent.

2. Grotius confounds the voluntary law of nations with the customary law of nations. Wolf maintains that it differs in this respect, that the voluntary law of nations is of universal obligation, whilst the customary law of nations merely prevails between particular nations, among whom it has been established from long usage and tacit consent.

§ 9. System of Vattel.

It is from the work of Wolf that Vattel has drawn the materials of his treatise on the law of nations. He, however, differs from that publicist in the manner of establishing the foundations of the voluntary law of nations. Wolf deduces the obligations of this law, as we have already seen, from the fiction of a great republic instituted by nature herself, and of which all the nations of the world are members. According to him the voluntary law of nations is, as it were, the civil law of that great republic. This idea does not satisfy Vattel. "I do not find," says he, "the fiction of such a republic either very just or sufficiently solid to deduce from it the rules of a universal law of nations, necessarily admitted among sovereign States. I do not recognise any other natural society between nations than that which nature has established between all men. It is the essence of all civil society, (*civitatis*,) that each member thereof should have given up a part of his rights to the body of the society, and that there should exist a supreme authority capable of commanding all the members, of giving to them laws, and of punishing those who refuse to obey. Nothing like this can be conceived or supposed to exist between nations. Each sovereign State pretends to be, and in fact is, independent of all others. Even according to Mr. Wolf, they must all be considered as so many free individuals, who live together in a state of nature and acknowledge no other law than that of nature itself, and its Divine Author" (*s*).

(*s*) Vattel, Droit des Gens, Préface.

According to Vattel, the Law of Nations, in its origin, is nothing but *the law of nature applied to nations.*

Having laid down this axiom, he qualifies it in the same manner, and almost in the identical terms of Wolf, by stating that the nature of the subject to which it is applied, being different, the law which regulates the conduct of individuals must necessarily be modified in its application to the collective societies of men called nations or States. A State is a very different subject from a human individual, from whence it results that the obligations and rights, in the two cases, are very different. The same general rule, applied to two subjects, cannot produce the same decisions when the subjects themselves differ. There are, consequently, many cases in which the natural law does not furnish the same rule of decision between State and State as would be applicable between individual and individual. It is the art of accommodating this application to the different nature of the subjects in a just manner, according to right reason, which constitutes the law of nations a particular science.

This application of the natural law, to regulate the conduct of nations in their intercourse with each other, constitutes what both Wolf and Vattel term the *necessary law of nations.* It is *necessary*, because nations are absolutely bound to observe it. The precepts of the natural law are equally binding upon States as upon individuals, since States are composed of men, and since the natural law binds all men, in whatever relation they may stand to each other. This is the law which Grotius and his followers call the *internal law of nations*, as it is obligatory upon nations in point of conscience. Others term it the *natural law of nations.* This law is immutable, as it consists in the application to States of the natural law, which is itself immutable, because founded on the nature of things, and especially on the nature of man.

This law being immutable, and the law which it imposes necessary and indispensable, nations can neither make any changes in it by their conventions, dispense with it in their own conduct, nor reciprocally release each other from the observance of it (*t*).

(*t*) Droit des Gens, Préliminaires, §§ vi. vii. viii. ix.

Vattel has himself anticipated one objection to his doctrine that States cannot change the necessary law of nations by their conventions with each other. This objection is, that it would be inconsistent with the liberty and independence of a nation to allow to others the right of determining whether its conduct was or was not conformable to the necessary law of nations. He obviates the objection by a distinction which pronounces treaties made in contravention of the necessary law of nations, to be invalid, according to the *internal* law, or that of conscience, at the same time that they may be valid by the *external* law; States being often obliged to acquiesce in such deviations from the former law in cases where they do not affect their perfect rights (*u*).

From this distinction of Vattel, flows what Wolf had denominated the voluntary law of nations, (*jus gentium voluntarium*,) to which term his disciple assents, although he differs from Wolf as to the manner of establishing its obligation. He, however, agrees with Wolf in considering the voluntary law of nations as a positive law, derived from the presumed or tacit consent of nations to consider each other as perfectly free, independent, and equal, each being the judge of its own actions, and responsible to no superior but the Supreme Ruler of the universe.

Besides this voluntary law of nations, these writers enumerate two other species of international law. These are:

1. The conventional law of nations, resulting from compacts between particular States. As a treaty binds only the contracting parties, it is evident that the conventional law of nations is not a universal, but a particular law.

2. The customary law of nations, resulting from usage between particular nations. This law is not universal, but binding upon those States only which have given their tacit consent to it.

Vattel concludes that these three species of international law, the *voluntary*, the *conventional*, and the *customary*, compose together the *positive law of nations*. They proceed from the will of nations; or (in the words of Wolf) "the

(*u*) Droit des Gens, Préliminaires, § ix.

voluntary, from their presumed consent; the *conventional*, from their express consent; and the *customary*, from their tacit consent" (*x*).

It is almost superfluous to point out the confusion in this enumeration of the different species of international law, which might easily have been avoided by reserving the expression, "voluntary law of nations," to designate the *genus*, including all the rules introduced by positive consent, for the regulation of international conduct, and divided into the two *species* of conventional law and customary law, the former being introduced by treaty, and the latter by usage; the former by express consent, and the latter by tacit consent between nations (*y*).

§ 10. System of Heffter.

According to Heffter, one of the most recent and distinguished public jurists of Germany, "the law of nations *jus gentium*, in its most ancient and most extensive acceptation, as established by the Roman jurisprudence, is a law (*Recht*) founded upon the general usage and tacit consent of nations. This law is applied, not merely to regulate the mutual relations of States, but also of individuals, so far as concerns their respective rights and duties, having everywhere the same character and the same effect, and the origin and peculiar form of which are not derived from the positive institutions of any particular State." According to this writer, the *jus gentium* consists of two distinct branches:

1. Human rights in general, and those private relations which Sovereign States recognise in respect to individuals not subject to their authority.

2. The direct relations existing between those States themselves.

In the modern world, this latter branch has exclusively received the denomination of law of nations, *Völkerrecht*, *Droit des Gens*, *Jus Gentium*. It may more properly be called external public law, to distinguish it from the internal public law of a particular State. The first part of the ancient *jus gentium* has become confounded with the municipal law of each particular nation, without at the same time losing its original and essential character. This part of the science

(*x*) Droit des Gens, Préliminaires, § xxvii.; Wolf, Proleg. § xxv.
(*y*) Vattel, Droit des Gens, edit. de Pinheiro Ferreira, tom. iii. p. 22.

concerns, exclusively, certain rights of men in general, and those private relations which are considered as being under the protection of nations. It has been usually treated of under the denomination of *private international law*."

§ 10a. Distinction between public and private international law.

This division of the subject into public and private international law is now very generally accepted. According to Sir Robert Phillimore, rights arising under the former class are called absolute, or rights *stricti juris*, "and their breach constitutes a *casus belli*, and justifies in the last resort a recourse to war," whereas private international law, or international comity, as it is sometimes called, confers no absolute rights. Its rules are founded upon convenience, and intended to facilitate the intercourse between the subjects of different States. "For a want of comity towards the individual subjects of a foreign State, reciprocity of treatment by the State whose subject has been injured, is, after remonstrance has been exhausted, the only legitimate remedy" (z).

Heffter does not admit the term international law (*droit international*) lately introduced and generally adopted by the most recent writers. According to him this term does not sufficiently express the idea of the *jus gentium* of the Roman jurisconsults. He considers the law of nations as a law common to all mankind, and which no people can refuse to acknowledge, and the protection of which may be claimed by all men and by all States. He places the foundation of this law on the incontestable principle that wherever there is a society, there must be a law obligatory on all its members; and he thence deduces the consequence that there must likewise be for the great society of nations an analogous law.

"Law in general (*Recht im Allegemeinen*) is the external freedom of the moral person. This law may be sanctioned and guaranteed by a superior authority, or it may derive its force from self-protection. The *jus gentium* is of the latter description. A nation associating itself with the general society of nations, thereby recognizes a law common to all nations by which its international relations are to be regulated. It cannot violate this law, without exposing itself to the danger of incurring the enmity of other nations, and without exposing to hazard its own existence. The motive which induces each particular nation to observe this law depends upon its persuasion that other nations will observe towards it the same law.

(z) [Phillimore, Int. Law, vol. i. § xvi.]

The *jus gentium* is founded upon reciprocity of will. It has neither lawgiver nor supreme judge, since independent States acknowledge no superior human authority. Its organ and regulator is public opinion: its supreme tribunal is history, which forms at once the rampart of justice and the Nemesis by whom injustice is avenged. Its sanction, or the obligation of all men to respect it, results from the moral order of the universe, which will not suffer nations and individuals to be isolated from each other, but constantly tends to unite the whole family of mankind in one great harmonious society (*a*)."

§ 11. There is no universal law of nations.

Is there a uniform law of nations? There certainly is not the same one for all the nations and States of the world. The public law, with slight exceptions, has always been, and still is, limited to the civilized and Christian people of Europe or to those of European origin. This distinction between the European law of nations and that of the other races of mankind has long been remarked by the publicists. Grotius states that the *jus gentium* acquires its obligatory force from the positive consent of all nations, or *at least of several*. "I say of several, for except the natural law, which is also called the *jus gentium*, there is no other law which is common to all nations. It often happens, too, that what is the law of nations in one part of the world is not so in another, as we shall show in the proper place (*b*)." So also Bynkershoek, in the passage before cited, says that "the law of nations is that which is observed, in accordance with the light of reason, between nations, if not among all, *at least certainly among the greater*

(*a*) Heffter, Das Europäische Völkerrecht, § 2.

The learned Jesuit Saurez has anticipated this view of the moral obligation of the *jus gentium*. "Ratio hujus juris est, quia humanum genus, quamvis in varios populos et regna divisum, semper habeat aliquam unitatem, non solum specificam, sed etiam quasi politicam et moralem, quam indicat naturale præceptum mutui amoris et misericordiæ, quod ad omnes extenditur, etiam extraneos et cujuscunque nationis. Quapropter, licet unaquaque civitas perfecta, respublica, aut regnum, sit in se communitas perfecta et suis membris constans, nihilominus quælibet illarum etiam membrum aliquo modo hujus universi prout genus humanum spectat. Nunquam enim illæ communitates adeo sunt sibi sufficientes sigillatim, quin indigeant aliquo mutuo juvamine, et societate, ac communicatione, interdum ad melius esse majoremque utilitatem, interdum vero et ob moralem necessitatem. Hâc ergo ratione indigent aliquo jure, quo dirigantur et recte ordinentur in hoc genere communicationis et societatis. Et quamvis magnâ ex parte hoc fiat per rationem naturalem, non tamen sufficienter et immediatè quoad omnia: ideoque potuerunt usu earundem gentium introduci." Saurez, de Legibus et Deo Legislatore, lib. ii. cap. xix. n. g.

(*b*) De Jur. Bel. ac Pac. lib. i. cap. 1, § xiv. 4.

part, and those the most civilized (*c*)." Leibnitz speaks of the voluntary law as established by the tacit consent of nations. "Not," says he, "that it is necessarily the law of all nations and of all times, since the Europeans and the Indians frequently differ from each other concerning the ideas which they have formed of international law, and even among us it may be changed by the lapse of time, of which there are numerous examples. The basis of international law is natural law, which has been modified according to times and local circumstances (*d*)." Montesquieu, in his *Esprit des Lois*, says, that "every nation has a law of nations—even the Iroquois, who eat their prisoners, have one. They send and receive ambassadors; they know the laws of war and peace; the evil is, that their law of nations is not founded upon true principles" (*e*).

There is then, according to these writers, no universal law of nations, such as Cicero describes in his treatise *De Republica*, binding upon the whole human race—which all mankind in all ages and countries, ancient and modern, savage and civilized, Christian and Pagan, have recognized in theory or in practice, have professed to obey, or have in fact obeyed (*f*).

§ 12. *Jus* and *Lex*.

An eminent French writer on the science of which we propose to treat, has questioned the propriety of using the term *droit des gens* (law of nations) as applicable to those rules of conduct which obtain between independent societies of men. He asserts "that there can be no *droit* (right) where there is no *loi* (law); and there is no law where there is no superior: without law, obligations, properly so called, cannot exist; there is only a moral obligation resulting from natural reason; such is the case between nation and nation. The word *gens*, imitated from the Latin, does not signify in the French language either people or nations" (*g*).

The same writer has made it the subject of serious reproach to the English language that it applies the term *law* to that

(*c*) Bynkershoek, De Foro Legatorum, *Vid. supra.*
(*d*) Leibnitz, Cod. Jur. Gent. diplom. Préf.
(*e*) Esprit des Lois, liv. i. ch. 3.
(*f*) [*The Madonna del Burso*, 4 C. Rob. 172; *The Hurtige Hane*, 3 C. Rob. 326].
(*g*) Rayneval, Institutions du droit de la nature et des gens, liv. I. note 10, p. viii.

system of rules which governs, or ought to govern, the conduct of nations in their mutual intercourse. His argument is, that law is a rule of conduct, deriving its obligation from sovereign authority, and binding only on those persons who are subject to that authority;—that nations, being independent of each other, acknowledge no common sovereign from whom they can receive the law;—that all the relative duties between nations result from *right* and *wrong*, from convention and usage, to neither of which can the term *law* be properly applied;—that this system of rules had been called by the Roman lawyers the *jus gentium*, and in all the languages of modern Europe, except the English language, the *right of nations*, or the laws of war and peace (*h*).

That very distinguished legal reformer, Jeremy Bentham, had previously expressed the same doubt how far the rules of conduct which obtain between nations can with strict propriety be called *laws* (*i*). And one of his disciples has justly observed, that "*laws*, properly so called, are commands proceeding from a determinate rational being, or a determinate body of rational beings, to which is annexed an eventual evil as the sanction. Such is the law of nature, more properly called the law of God, or the divine law; and such are political human laws, prescribed by political superiors to persons in a state of subjection to their authority. But laws imposed by general opinion are styled *laws* by an analogical extension of the term. Such are the laws of honour imposed by opinions current in the fashionable world, and enforced by appropriate sanction. Such, also, are the laws which regulate the conduct of independent political societies in their mutual relations, and which are called the law of nations, or international law. This law obtaining between nations is not positive law; for every positive law is prescribed by a given superior or sovereign to a person or persons in a state of subjection to its author. The rule concerning the conduct of sovereign States, considered as related to each other, is termed *law* by its analogy to positive law, being imposed upon nations or

(*h*) Droit des gens, *Fr.* Diritto delle genti, *Ital.* Direito das Gentes, *Portug.* Volkerrecht, *Germ.* Volkenregt, *Dutch.* Folkeret, *Dan.* Folkratt, *Swed.* Derecho des gentes, *Span.*

(*i*) Bentham, Morals and Legislation, vol. ii. p. 256. Ed. 1823.

sovereigns, not by the positive command of a superior authority, but by opinions generally current among nations. The duties which it imposes are enforced by moral sanctions: by fear on the part of nations, or by fear on the part of sovereigns, of provoking general hostility, and incurring its probable evils, in case they should violate maxims generally received and respected (*k*).

This law has commonly been called the *jus gentium* in the Latin, *droit des gens* in the French, and law of nations in the English language. It was more accurately termed the *jus inter gentes*, the law between or among nations, for the first time, by Dr. Zouch, an English civilian and writer on the science, distinguished in the celebrated controversy between the civil and common lawyers during the reign of Charles II., as to the extent of the Admiralty jurisdiction. He introduced this term as more appropriate to express the real scope and object of this law (*l*). An equivalent term in the French language was subsequently proposed by Chancellor D'Aguesseau, as better adapted to express the idea properly annexed to that system of jurisprudence commonly called *le droit des gens*, but which, according to him, ought properly to be termed *le droit entre les gens* (*m*). The term *international* law has been since proposed by Mr. Bentham as well adapted to express in our language, "in a more significant manner that branch of jurisprudence, which commonly goes under the name of *law of nations*, a denomination so uncharacteristic, that were it not for the force of custom, it would rather seem to refer to internal or municipal jurisprudence" (*n*). The terms *international law* and *droit international* have now taken root in the English and French languages, and are constantly used in all discussions connected with the science, and we cannot agree with Heffter in proscribing them.

§ 13. Opinion of Savigny.

According to Savigny, "there may exist between different nations the same community of ideas which contributes to form the positive unwritten law (*das positive Recht*) of a particular nation. This community of ideas, founded upon a common

(*k*) Austin, Province of Jurisprudence determined, pp. 147, 207.
(*l*) Zouch, Juris et judicii fecialis, sive *Juris inter gentes*. Lond. 1650.
(*m*) Œuvres de D'Aguesseau, tome ii. p. 337. Ed. 1773.
(*n*) Bentham, Morals and Legislation, vol. ii. p. 256.

origin and religious faith, constitutes international law as we see it existing among the Christian States of Europe, a law which was not unknown to the people of antiquity, and which we find among the Romans under the name of *jus feciale*. International law may therefore be considered as a positive law, but as an imperfect positive law, (*eine unvollendete Rechtsbildung*,) both on account of the indeterminateness of its precepts, and because it lacks that solid basis on which rests the positive law of every particular nation, the political power of the State and a judicial authority competent to enforce the law. The progress of civilization, founded on Christianity, has gradually conducted us to observe a law analogous to this in our intercourse with all the nations of the globe, whatever may be their religious faith, and without reciprocity on their part" (*o*).

It may be remarked, in confirmation of this view, that the more recent intercourse between the Christian nations of Europe and America and the Mohammedan and Pagan nations of Asia and Africa indicates a disposition, on the part of the latter, to renounce their peculiar international usages and adopt those of Christendom. The rights of legation have been recognized by, and reciprocally extended to, Turkey, Persia, Egypt, and the States of Barbary. The independence and integrity of the Ottoman Empire have been long regarded as forming essential elements in the European balance of power, and, as such, have recently become the objects of conventional stipulations between the Christian States of Europe and that Empire, which may be considered as bringing it within the pale of the public law of the former (*p*).

The same remark may be applied to the recent diplomatic transactions between the Chinese Empire and the Christian nations of Europe and America, in which the former has been compelled to abandon its inveterate anti-commercial and anti-social principles, and to acknowledge the independence and equality of other nations in the mutual intercourse of war and peace.

(*o*) Savigny, System des heutigen Romischen Rechts, 1 B'd, 1 Buch. Kap. ii. § 11.

(*p*) Wheaton's Hist. Law of Nations, p. 583.

International law, as understood among civilized nations, may be defined as consisting of those rules of conduct which reason deduces, as consonant to justice, from the nature of the society existing among independent nations; with such definitions and modifications as may be established by general consent (*q*). § 14. Definition of international law.

The various sources of international law in these different branches are the following:— § 15. Sources of international law.

1. Text writers of authority, showing what is the approved usage of nations, or the general opinion respecting their mutual conduct, with the definitions and modifications introduced by general consent.

Without wishing to exaggerate the importance of these writers, or to substitute, in any case, their authority for the principles of reason, it may be affirmed that they are generally impartial in their judgment. They are witnesses of the sentiments and usages of civilized nations, and the weight of their testimony increases every time that their authority is invoked by statesmen, and every year that passes without the rules laid down in their works being impugned by the avowal of contrary principles.

2. Treaties of peace, alliance, and commerce declaring, modifying, or defining the pre-existing international law.

What has been called the positive or practical law of nations may also be inferred from treaties; for though one or two treaties, varying from the general usage and custom of nations, cannot alter the international law, yet an almost perpetual succession of treaties, establishing a particular rule, will go very far towards proving what that law is on a disputed point. Some of the most important modifications and improvements in the modern law of nations have thus originated in treaties (*r*).

"Treaties," says Mr. Madison, "may be considered under several relations to the law of nations, according to the several questions to be decided by them.

"They may be considered as simply repeating or affirming the general law; they may be considered as making excep-

(*q*) Madison, Examination of the British Doctrine which subjects to Capture a Neutral Trade not open in Time of Peace, p. 41. London Ed. 1806.
(*r*) Bynkershoek, Quest. Jur. Pub. lib. i. cap. 10.

tions to the general law, which are to be a particular law between the parties themselves; they may be considered explanatory of the law of nations on points where its meaning is otherwise obscure or unsettled, in which they are, first, a law between the parties themselves, and next, a sanction to the general law, according to the reasonableness of the explanation, and the number and character of the parties to it; lastly, treaties may be considered a voluntary or positive law of nations" (s).

3. Ordinances of particular States prescribing rules for the conduct of their commissioned cruisers and prize tribunals.

The marine ordinances of a State may be regarded, not only as historical evidences of its practice with regard to the rights of maritime war, but also as showing the views of its jurists with respect to the rules generally recognized as conformable to the universal law of nations. The usage of nations, which constitutes the law of nations, has not yet established an impartial tribunal for determining the validity of maritime captures. Each belligerent State refers the jurisdiction over such cases to the courts of admiralty established under its own authority within its own territory, with a final resort to a supreme appellate tribunal, under the direct control of the executive government. The rule by which the prize courts thus constituted are bound to proceed in adjudicating such cases, is not the municipal law of their own country, but the general law of nations, and the particular treaties by which their own country is bound to other States. They may be left to gather the general law of nations from its ordinary sources in the authority of institutional writers; or they may be furnished with a positive rule by their own sovereign, in the form of ordinances, framed according to what their compilers understood to be the just principles of international law.

The theory of these ordinances is well explained by an eminent English civilian of our own times. "When," says Sir William Grant, "Louis XIV. published his famous ordinance of 1681, nobody thought that he was undertaking to legislate for Europe, merely because he collected together and reduced

(s) Madison, Examination of the British Doctrine, &c. p. 39.

into the shape of an ordinance the principles of marine law as then understood and received in France. I say as understood in France, for although the law of nations ought to be the same in every country, yet as the tribunals which administer the law are wholly independent of each other, it is impossible that some differences shall not take place in the manner of interpreting and administering it in the different countries which acknowledge its authority. Whatever may have been since attempted, it was not, at the period now referred to, supposed that one State could make or alter the law of nations, but it was judged convenient to establish certain principles of decision, partly for the purpose of giving a uniform rule to their own courts, and partly for the purpose of apprising neutrals what that rule was. The French courts have well and properly understood the effect of the ordinances of Louis XIV. They have not taken them as positive rules binding upon neutrals; but they refer to them as establishing legitimate presumptions, from which they are warranted to draw the conclusion, which it is necessary for them to arrive at, before they are entitled to pronounce a sentence of condemnation" (*t*).

4. The adjudications of international tribunals, such as boards of arbitration and courts of prize.

As between these two sources of international law, greater weight is justly attributable to the judgments of mixed tribunals, appointed by the joint consent of the two nations between whom they are to decide, than to those of admiralty courts established by and dependent on the instructions of one nation only.

5. Another depository of international law is to be found in the written opinions of official jurists, given confidentially to their own governments. Only a small portion of the controversies which arise between States become public. Before one State requires redress from another, for injuries sustained

(*t*) Marshall on Insurance, vol. i. 425. The commentary of Valin upon the marine ordinance of Louis XIV., published in 1760, contains a most valuable body of maritime law, from which the English writers and judges, especially Lord Mansfield, have borrowed very freely, and which is often cited by Sir W. Scott (Lord Stowell) in his judgments in the High Court of Admiralty. Valin also published, in 1763, a separate *Traité des Prises*, which contains a complete collection of the French prize ordinances down to that period.

by itself, or its subjects, it generally acts as an individual would do in a similar situation. It consults its legal advisers, and is guided by their opinion as to the law of the case. Where that opinion has been adverse to the sovereign client, and has been acted on, and the State which submitted to be bound by it was more powerful than its opponent in the dispute, we may confidently assume that the law of nations, such as it was then supposed to be, has been correctly laid down. The archives of the department of foreign affairs of every country contain a collection of such documents, the publication of which would form a valuable addition to the existing materials of international law (*u*).

6. The history of the wars, negotiations, treaties of peace, and other transactions relating to the public intercourse of nations, may conclude this enumeration of the sources of international law.

§ 15a. The authority of text writers.

Jurists accustomed to the Common Law of England and America, where judicial decisions form a binding precedent, and are authoritative expositions of the law, are, as a rule, inclined towards resting international law on practice and precedent, and prefer to rely upon the decision of a court or the act of a government, rather than upon theory or the *dicta* of text-writers, however unanimous or eminent the writers may be. On the other hand, in France and other countries where the whole law is contained in a code, and where the decisions of the courts only settle the matter in dispute between the parties, and form no binding precedent, jurists place very great reliance on the theoretical speculations of text-writers, and frequently consider the rules they lay down as the highest authority. It is not too much to say that the influence of speculative writers in England is comparatively small. In the days of Grotius,

(*u*) Senior, Edinburgh Rev. No. 156, art. 1, p. 311.

The written opinions delivered by Sir Leoline Jenkins, Judge of the High Court of Admiralty in the reign of Charles II., in answer to questions submitted to him by the King or by the Privy Council, relating to prize causes, were published as an Appendix to Wynne's Life of that eminent civilian. (2 vols. fol. London, 1724.) They form a rich collection of precedents in the maritime law of nations, the value of which is enhanced by the circumstance that the greater part of these opinions were given when England was neutral, and was consequently interested in maintaining the right of neutral commerce and navigation. The decisions they contain are dictated by a spirit of impartiality and equity, which does the more honour to their author as they were addressed to a monarch who gave but little encouragement to those virtues, and as Jenkins himself was too much of a courtier to practise them, except in his judicial capacity. Madison, Examination of the British Doctrine, &c., p. 113. Lond. edit. 1806. [The opinions of American Attorneys-General are published. Mr. Forsyth has also published a collection of some of the opinions of English law officers given at various times, under the title of Cases and Opinions on Constitutional Law. Some of these relate to international law.]

when his own works, and a few other treatises, were almost the only source from which anything on the subject could be derived, text-writers had the greatest reverence paid to their opinions. But now that precedents are to be found upon so many points, a text-writer who ignores them, and appeals to theory or to other text-writers instead of to facts, must not expect to receive any great attention in this country. "Writers on international law," says Lord Chief-Justice Cockburn, "however valuable their labours may be in elucidating and ascertaining the principles and rules of law, cannot make the law. To be binding, the law must have received the assent of the nations who are to be bound by it. This assent may be express, as by treaty or the acknowledged concurrence of governments, or may be implied from established usage" (*x*).

§ 15b. Rules of law in treaties.

Several treaties have been entered into of late years for the sole purpose of laying down rules of international law which shall bind the contracting parties. Such, for instance, are the Declarations of Paris, 1856, and of St. Petersburg, 1868, and the Geneva Convention, 1864. In others, as in the Treaty of Washington, 1871, rules of law have been inserted among the other provisions.

§ 15c. Marine ordinances not necessarily universal.

The principles laid down in marine ordinances must not always be assumed to have an universal application. "They furnish, however," says Sir R. Phillimore, "decisive evidence against any State which afterwards departs from the principles which it has thus deliberately invoked; and in every case thus clearly recognize the fact that a system of law exists, which ought to regulate and control the international relations of every State" (*y*).

These ordinances are, however, *ex parte* instruments, and ought not to be enforced if at variance with the established usage of nations, for no State has the right of laying down rules which shall bind other States that have not consented to them (*z*).

§ 15d. Courts of Admiralty.

Courts of Admiralty are courts of the law of nations (*a*). It is the duty of the judge presiding in such courts "not to deliver occasional and shifting opinions to serve present purposes of particular national interest, but to administer with indifference that justice which the law of nations holds out, without distinction to independent States, some happening to be neutral and some belligerent" (*b*). The records of the English and American Courts of Admiralty are peculiarly valuable, from their containing the judgments of such eminent men as Lord Stowell and Dr. Lushington, Kent and Story.

(*x*) [*R.* v. *Keyn* (*The Franconia*), 2 Ex. D. 202].

(*y*) [Phillimore, vol. i. § 57].

(*z*) [*Wolff* v. *Oxholm*, 6 M. & S. 92; *The Nereide*, 9 Cranch, 388; *The Zollverein*, 2 Jur N. S. 429; S. C. Swa. 96; *Cope* v. *Doherty*, 4 K. & J. 390].

(*a*) [Reply to Prussian Memorial, 1753. Harg. Coll. Jur. vol. ii. p. 130; *The Recovery*, 6 C. Rob. 348].

(*b*) [Per Lord Stowell, in *The Maria*, 1 C. Rob. 350; Calvo. Droit Int. vol. i. p. 111; Halleck, p. 58].

CHAPTER II.

NATIONS AND SOVEREIGN STATES.

§ 16. Subjects of international law.

THE peculiar subjects of international law are Nations, and those political societies of men called States.

§ 17. Definition of a State.

Cicero, and, after him, the modern public jurists, define a State to be, a body politic, or society of men, united together for the purpose of promoting their mutual safety and advantage by their combined strength (*a*).

This definition cannot be admitted as entirely accurate and complete, unless it be understood with the following limitations:—

1. It must be considered as excluding corporations, public or private, created by the State itself, under whose authority they exist, whatever may be the purposes for which the individuals composing such bodies politic, may be associated.

Thus the great association of British merchants incorporated, first, by the crown, and afterwards by Parliament, for the purpose of carrying on trade to the East Indies, could not be considered as a State, even whilst it exercised the sovereign powers of war and peace in that quarter of the globe without the direct control of the crown, and still less can it be so considered since it has been subjected to that control. Those powers are exercised by the East India Company in subordination to the supreme power of the British empire, the external sovereignty of which is represented by the company towards the native princes and people, whilst the British

(*a*) "Respublica est cœtus multitudinis, juris consensu et utilitatis communione societas." Cic. de Rep. l. i. § 25.

"Potestas civilis est, qui civitati præest. Est autem civitas cœtus perfectus liberorum hominum, juris fruendi et communis utilitatis causâ sociatus." Grotius, de Jur. Bel. ac. Pac. lib. i. cap i. § xiv. No. 2. Vattel, Prélim. § 1, et liv. 1, ch. 1, § 1. Burlamaqui, Droit naturel, tom ii. part 1, ch. 4. [Heffter, liv. 1, § 16, p. 35. *Texas* v. *White*, 7 Wallace, 720.]

government itself represents the company towards other foreign sovereigns and States (*b*).

2. Nor can the denomination of a State be properly applied to voluntary associations of robbers or pirates, the outlaws of other societies, although they may be united together for the purpose of promoting their own mutual safety and advantage (*c*).

3. A State is also distinguishable from an unsettled horde of wandering savages not yet formed into a civil society. The legal idea of a State necessarily implies that of the habitual obedience of its members to those persons in whom the superiority is vested, and of a fixed abode, and definite territory belonging to the people by whom it is occupied.

4. A State is also distinguishable from a Nation, since the former may be composed of different races of men, all subject to the same supreme authority. Thus the Austrian, Prussian, and Ottoman empires, are each composed of a variety of nations and people. So, also, the same nation or people may be subject to several States, as is the case with the Poles, subject to the dominion of Austria, Prussia, and Russia, respectively.

§ 17a. Nations and States.

The Jews and the Gipsies are undoubtedly nations, but they cannot be said to form States. The idea of a nation implies community of race, which is generally shown by community of language, manners, and customs (*d*). A State, on the other hand, implies the union of a number of individuals in a fixed territory, and under one central authority. Austria is a State, but as Prince Gortchakoff sarcastically remarked about it, "it is a government, and not a nation." There is now prevalent in Europe a desire that States should be established on the basis of nationality, so that all members of the same race may be united under the same government. The existence in their present form, of the Empire of Germany, and the Kingdom of Italy, is due in some measure to this sentiment (*e*).

§ 17b. Meaning of

In the constitution of the United States, the term State most fre-

(*b*) [See *The Secretary of State for India* v. *Sahaba*, 13 Moo. P. C. 22].

(*c*) * * * "nec cœtus piratarum aut latronum civitas est, etiam si fortè æqualitatem quandam inter se servent, sine quâ nullus cœtus posset consistere." Grotius, de Jur. Bel. ac. Pac. lib. iii. cap. iii § ii. No. 1. [Thus the Malay and Sooloo pirates of Borneo and the Eastern Archipelago are no doubt united for their own mutual safety and advantage, but they do not form States. *The Serhassan Pirates*, 2 W. Rob. 354; *The Illanon Pirates*, 6 Moo. P. C. 471. Nor did the Buccaneers of the 17th century].

(*d*) [Calvo, Droit Int. vol. i. § 29].

(*e*) [M. de Schleinitz to Comte de St. Simon; Annuaire des Deux Mondes, 1860, p. 786].

State in the American Constitution.

quently expresses the combined idea of people, territory, and government. A State, in the ordinary sense of the constitution, is a political community of free citizens, occupying a territory of defined boundaries, and organized under a government sanctioned and limited by a written constitution, and established by the consent of the governed. It is the union of such States, under a common constitution, which forms the distinct and greater political unit, which that constitution designates as the United States, and makes of the people and States which compose it one people and one country (*f*).

§ 18. Sovereign princes the subjects of international law.

Sovereign princes may become the subjects of international law, in respect to their personal rights, or rights of property, growing out of their personal relations with States foreign to those over whom they rule, or with the sovereigns or citizens of those foreign States. These relations give rise to that branch of the science which treats of the rights of sovereigns in this respect (*g*).

§ 19. Individuals, or corporations, the subjects of international law.

Private individuals, or public and private corporations may in like manner, incidentally, become the subjects of this law in regard to rights growing out of their international relations with foreign sovereigns and States, or their subjects and citizens. These relations give rise to that branch of the science which treats of what has been termed private international law, and especially of the conflict between the municipal laws of different States.

The terms sovereign and state used synonymously, or the former used metaphorically for the latter.

But the peculiar objects of international law, are those direct relations which exist between nations and States. Wherever, indeed, the absolute or unlimited monarchical form of government prevails in any State, the person of the prince is necessarily identified with the State itself: *l'Etat c'est moi.* Hence the public jurists frequently use the terms sovereign and State as synonymous. So also the term sovereign is sometimes used in a metaphorical sense merely to denote a State, whatever may be the form of its government, whether monarchical or republican, or mixed.

§ 20. Sovereignty defined.

Sovereignty is the supreme power by which any State is governed. This supreme power may be exercised either internally or externally.

Internal sovereignty.

Internal sovereignty is that which is inherent in the people

(*f*) [Per Chief-Justice Chase, in *Texas* v. *White*, 7 Wallace, 721].

(*g*) [See *Duke of Brunswick* v. *King of Hanover*, 2 H. of L. Cas. 1; *The Charkieh*, L. R. 4 A. & E. 87].

of any State, or vested in its ruler, by its municipal constitution or fundamental laws. This is the object of what has been called internal public law, *droit public interne*, but which may more properly be termed constitutional law.

External sovereignty consists in the independence of one political society, in respect to all other political societies. It is by the exercise of this branch of sovereignty that the international relations of one political society are maintained, in peace and in war, with all other political societies. The law by which it is regulated has, therefore, been called external public law, *droit public externe*, but may more properly be termed international law. External sovereignty.

The recognition of any State by other States, and its admission into the general society of nations, may depend, or may be made to depend, at the will of those other States, upon its internal constitution or form of government, or the choice it may make of its rulers. But whatever be its internal constitution, or form of government, or whoever may be its rulers, or even if it be distracted with anarchy, through a violent contest for the government between different parties among the people, the State still subsists in contemplation of law, until its sovereignty is completely extinguished by the final dissolution of the social tie, or by some other cause which puts an end to the being of the State.

Sovereignty is acquired by a State, either at the origin of the civil society of which it is composed, or when it separates itself from the community of which it previously formed a part, and on which it was dependent (*h*). § 21. Sovereignty, how acquired.

This principle applies as well to internal as to external sovereignty. But an important distinction is to be noticed, in this respect, between these two species of sovereignty. The internal sovereignty of a State does not, in any degree, depend upon its recognition by other States. A new State, springing into existence, does not require the recognition of other States to confirm its internal sovereignty. The existence of the State *de facto* is sufficient, in this respect, to establish its sovereignty *de jure*. It is a State because it exists.

Thus the internal sovereignty of the United States of

(*h*) Klüber, Droit des Gens moderne de l'Europe, § 23.

America was complete from the time they declared themselves "free, sovereign, and independent States," on the 4th of July, 1776. It was upon this principle that the Supreme Court determined, in 1808, that the several States composing the Union, so far as regards their municipal regulations, became entitled, from the time when they declared themselves independent, to all the rights and powers of sovereign States, and that they did not derive them from concessions made by the British King. The treaty of peace of 1782, contained a recognition of their independence, not a grant of it. From hence it resulted, that the laws of the several State governments were, from the date of the declaration of independence, the laws of sovereign States, and as such were obligatory upon the people of such State from the time they were enacted. It was added, however, that the court did not mean to intimate the opinion, that even the law of any State of the Union, whose constitution of government had been recognised prior to the 4th of July, 1776, and which law had been enacted prior to that period, would not have been equally obligatory (*i*).

§ 21a. *De jure* and *de facto* governments.

"A *de jure* government is one which, in the opinion of the person using the phrase, ought to possess the powers of sovereignty, though at the time it may be deprived of them. A *de facto* government is one which is really in possession of them, although the possession may be wrongful or precarious" (*k*).

There are several degrees of what is called *de facto* government. Such a government in its highest degree assumes a character very closely resembling that of a lawful government. This is when the usurping government expels the regular authorities from their customary seats and functions, and establishes itself in their place, and so becomes the actual government of a country. The distinguishing characteristic of such a government is, that adherents to it in war against the government *de jure* do not incur the penalties of treason; and, under certain limitations, obligations assumed by it on behalf of the country, or otherwise, will in general be respected by the government *de jure* when restored. The government of England under the Commonwealth is an example of such a *de facto* government.

There is another species of *de facto* government, and it is one which may be perhaps aptly called a government of paramount force. Its distinguishing characteristics are: (1) That its existence is maintained

(*i*) *M'Ilvaine* v. *Coxe's Lessee*, 4 Cranch, 212.

(*k*) [Montague Bernard, Neutrality of Great Britain during American Civil War, p. 108].

by active military power, within the territories, and against the rightful authority of an established and lawful government; and (2) that while it exists, it must necessarily be obeyed in civil matters by private citizens who, by acts of obedience, rendered in submission to such force, do not become responsible, as wrong-doers, for those acts, though not warranted by the laws of the rightful government. The government of the Confederate States was one of this class. The rights and obligations of a belligerent were conceded to it in its military character, very soon after the war began, from motives of humanity and expediency by the United States. The whole territory controlled by it was thereafter held to be enemy's territory, and the inhabitants of that territory were held in most respects for enemies. But it was never recognized as an independent power (*l*).

The external sovereignty of any State, on the other hand, may require recognition by other States in order to render it perfect and complete. So long, indeed, as the new State confines its action to its own citizens, and to the limits of its own territory, it may well dispense with such recognition. But if it desires to enter into that great society of nations, all the members of which recognize rights to which they are mutually entitled, and duties which they may be called upon reciprocally to fulfil, such recognition becomes essentially necessary to the complete participation of the new State in all the advantages of this society. Every other State is at liberty to grant, or refuse, this recognition, subject to the consequences of its own conduct in this respect: and until such recognition becomes universal on the part of the other States, the new State becomes entitled to the exercise of its external sovereignty as to those States only by whom that sovereignty has been recognized (*m*).

§ 22. Identity of a State.

The identity of a State consists in its having the same origin or commencement of existence; and its difference from all other States consists in its having a different origin or commencement of existence. A State, as to the individual members of which it is composed, is a fluctuating body; but in respect to the society, it is one and the same body, of which the existence is perpetually kept up by a constant succession of new members. This existence continues until it is interrupted by some change affecting the being of the State (*n*).

(*l*) [*Thorington* v. *Smith*, 8 Wallace, 8—11].
(*m*) [See *post*, § 27 d.]
(*n*) Grotius, de Jur. Bel. ac. Pac. lib. ii. cap. 9, § 3. Rutherforth's Inst.

How affected by internal revolution.

If this change be an internal revolution, merely altering the municipal constitution and form of government, the State remains the same; it neither loses any of its rights, nor is discharged from any of its obligations (*o*).

The habitual obedience of the members of any political society to a superior authority must have once existed in order to constitute a sovereign State. But the temporary suspension of that obedience and of that authority, in consequence of a civil war, does not necessarily extinguish the being of the State, although it may affect for a time its ordinary relations with other States.

§ 23. Conduct of foreign States towards another nation involved in civil war.

Until the revolution is consummated, whilst the civil war involving a contest for the government continues, other States may remain indifferent spectators of the controversy, still continuing to treat the ancient government as sovereign, and the government *de facto* as a society entitled to the rights of war against its enemy; or may espouse the cause of the party which they believe to have justice on its side. In the first case, the foreign State fulfils all its obligations under the law of nations; and neither party has any right to complain, provided it maintains an impartial neutrality. In the latter, it becomes, of course, the enemy of the party against whom it declares itself, and the ally of the other; and as the positive law of nations makes no distinction, in this respect, between a just and an unjust war, the intervening State becomes entitled to all the rights of war against the opposite party (*p*).

Parties to civil war entitled to rights of war against each other.

If the foreign State professes neutrality, it is bound to allow impartially to both belligerent parties the free exercise of those rights which war gives to public enemies against each other; such as the right of blockade, and of capturing contraband and enemy's property (*q*). But the exercise of those rights, on the part of the revolting colony or province against the metropolitan country, may be modified by the obligation

b. ii. c. 10, §§ 12, 13. Heffter, Das Europäische Völkerrecht, § 24. [*Texas* v. *White*, 7 Wallace, 729].

(*o*) Grotius, lib. ii. cap. 9, § 8. Rutherforth, b. ii. c. 10, § 14. Puffendorf, de Jur. Nat. et Gent. lib. viii. cap. 12, §§ 1—3.

(*p*) Vattel, Droit des Gens, liv. ii. ch. 4, § 56. Martens, Précis du Droit des Gens, liv. iii. ch. 2, §§ 79—82. [Letters of Historicus, p. 29; Halleck, p. 74].

(*q*) *United States* v. *Palmer*, 3 Wheaton, 610; *The Divina Pastora*, 4 Id. 63; *The Nuestra Signora de la Caridad*, Id. 502.

of treaties previously existing between that country and foreign States (r).

§ 24. Identity of a State, how affected by external violence.

If, on the other hand, the change be effected by external violence, as by conquest confirmed by treaties of peace, its effects upon the being of the State are to be determined by the stipulations of those treaties. The conquered and ceded country may be a portion only, or the whole of the vanquished State. If the former, the original State still continues; if the latter, it ceases to exist. In either case, the conquered territory may be incorporated into the conquering State as a province, or it may be united to it as a co-ordinate State with equal sovereign rights.

§ 25. By the joint effect of internal and external violence confirmed by treaty.

Such a change in the being of a State may also be produced by the conjoint effect of internal revolution and foreign conquest, subsequently confirmed, or modified and adjusted by international compacts. Thus the House of Orange was expelled from the Seven United Provinces of the Netherlands, in 1797, in consequence of the French Revolution and the progress of the arms of France, and a democratic republic substituted in the place of the ancient Dutch constitution. At the same time the Belgic provinces, which had long been united to the Austrian monarchy as a co-ordinate State, were conquered by France, and annexed to the French republic by the treaties of Campo Formio and Luneville. On the restoration of the Prince of Orange, in 1813, he assumed the title of Sovereign Prince, and afterwards King of the Netherlands; and by the treaties of Vienna, the former Seven United Provinces were united with the Austrian Low Countries into one State, under his sovereignty (s).

Here is an example of two States incorporated into one, so as to form a new State, the independent existence of each of the former States entirely ceasing in respect to the other; whilst the rights and obligations of both still continue in respect to other foreign States, except so far as they may be affected by the compacts creating the new State.

In consequence of the revolution which took place in Belgium, in 1830, this country was again severed from Holland, and its independence as a separate kingdom acknow-

(r) See *post*, Part IV. ch. 3, § 414. Rights of War as to Neutrals.
(s) Wheaton's Hist. Law of Nations, p. 492.

ledged and guaranteed by the five great powers of Europe,—Austria, France, Great Britain, Prussia, and Russia. Prince Leopold of Saxe-Cobourg having been subsequently elected king of the Belgians by the national Congress, the terms and conditions of the separation were stipulated by the treaty concluded on the 15th of November, 1831, between those powers and Belgium, which was declared by the conference of London to constitute the invariable basis of the separation, independence, neutrality, and state of territorial possession of Belgium, subject to such modifications as might be the result of direct negotiation between that kingdom and the Netherlands (*t*).

§ 26. Province or colony asserting its independence, how considered by other foreign States.

If the revolution in a State be effected by a province or colony shaking off its sovereignty, so long as the independence of the new State is not acknowledged by other powers, it may seem doubtful, in an international point of view, whether its sovereignty can be considered as complete, however it may be regarded by its own government and citizens. It has already been stated, that whilst the contest for the sovereignty continues, and the civil war rages, other nations may either remain passive, allowing to both contending parties all the rights which war gives to public enemies; or may acknowledge the independence of the new State, forming with it treaties of amity and commerce; or may join in alliance with one party against the other. In the first case, neither party has any right to complain so long as other nations maintain an impartial neutrality, and abide the event of the contest. The two last cases involve questions which seem to belong rather to the science of politics than of international law; but the practice of nations, if it does not furnish an invariable rule for the solution of these questions, will, at least, shed some light upon them. The memorable examples of the Swiss Cantons and of the Seven United Provinces of the Netherlands, which so long levied war, concluded peace, contracted alliances, and performed every other act of sovereignty, before their independence was finally acknowledged,—that of the first by the German empire, and that of the latter by Spain,—go far to show the general sense of mankind on this subject (*u*).

(*t*) Wheaton's Hist. Law of Nations, pp. 538—555.
(*u*) [Motley's Life of John Barneveld, chap. i.]

The acknowledgment of the independence of the United States of America by France, coupled with the assistance secretly rendered by the French court to the revolted colonies, was considered by Great Britain as an unjustifiable aggression, and, under the circumstances, it probably was so (*v*). But had the French court conducted itself with good faith, and maintained an impartial neutrality between the two belligerent parties, it may be doubted whether the treaty of commerce, or even the eventual alliance between France and the United States, could have furnished any just ground for a declaration of war against the former by the British Government. The more recent example of the acknowledgment of the independence of the Spanish American provinces by the United States, Great Britain, and other powers, whilst the parent country still continued to withhold her assent, also concurs to illustrate the general understanding of nations, that where a revolted province or colony has declared and shown its ability to maintain its independence, the recognition of its sovereignty by other foreign States is a question of policy and prudence only.

§ 27. Recognition of its independence by other foreign States

This question must be determined by the sovereign legislative or executive power of these other States, and not by any subordinate authority, or by the private judgment of their individual subjects. Until the independence of the new State has been acknowledged, either by the foreign State where its sovereignty is drawn in question, or by the government of the country of which it was before a province, courts of justice and private individuals are bound to consider the ancient state of things as remaining unaltered (*x*).

§ 27a. Recognition of belligerency and independence.

On the outbreak of a rebellion or insurrection in any country, it is *primâ facie* the duty of foreign States to take no part in the matter, and to allow events to follow their own course. But the facts of the case frequently render it necessary for other nations to take cognizance of the existence of the insurrection. When countries are intimately connected with each other, through situation or commerce, a revolt of any

(*v*) Wheaton's Hist. Law of Nations, Pt. iii. § 12, pp. 220—294. Ch. de Martens, Nouvelles Causes célèbres du Droit des Gens, tome i. pp. 370—498. [It was the cause of war being declared by England. Historicus, p. 32.]

(*x*) *City of Berne* v. *Bank of England*, 9 Vesey, 347; *The Manilla*, Edwards, Ad. Rep. 1, App. iv. Note D; *Hoyt* v. *Gelston*, 3 Wheaton, 324; *U. S.* v. *Palmer*, ib. 634. [*The Nueva Anna*, 6 Wheaton, 193; *Thompson* v. *Powles*, 2 Simons, 194; *U. S.* v. *Wagner*, L. R. 2 Ch. 582.]

magnitude in one, materially affects the rights and interest of the others, and entails upon them the necessity of pursuing some definite course of conduct towards the disturbed State. This may be done either by recognising the insurgents as belligerents, or by acknowledging them to be independent. There is, however, a very material distinction between the state of facts which will call for the former, and that which will justify the latter mode of recognition.

§ 27b. Belligerency.

When a rebellion has assumed such proportions that it may, without abuse of language, be called a war, and when it is carried on by some species of organised government or authority, in full possession of the territory where it claims to exercise authority, neutral States may then recognise such revolted government as a belligerent. This is simply the assertion of a fact, and ought in no case to give offence to the parent State. It is no violation of neutrality. It informs the subjects of the neutral officially that war exists, and that they must observe towards the combatants the duties that international law imposes. "The question," said Lord Russell, "for neutral nations to consider is, what is the character of the war, and whether it should be regarded as a war carried on between parties severally in a position to wage war, and to claim the rights and to perform the obligations attaching to belligerents?" (*y*) By a recognition of belligerency the neutral accepts and recognises within its jurisdiction the flag of the revolted government, the commissions it issues, and the decisions of prize courts sitting within its territory, not as being emanations and symbols of sovereignty, but as proceeding from an organised body of persons who, so far as waging war goes, are able to act as a sovereign State (*z*). When the struggle is carried on by sea as well as by land, the interests of neutral commerce render a recognition of belligerency absolutely necessary. Without it the struggle is not, in the eye of international law, a war, and if not a war, there is no obligation on the part of neutrals to respect any blockade, or to allow their merchant-vessels to be stopped and searched on the high seas by the cruisers of either party. Inevitable collisions would ensue, which would not improbably drag neutral nations into the conflict. Moreover, the higher considerations of humanity require a *de facto* war to be acknowledged as such. If the conflict continues entirely unrecognised as a war, every insurgent is liable to be executed as a rebel or traitor on land, and as a pirate on the sea. A recognition of belligerency is not simply a benefit conferred upon insurgents; it gives the parent State belligerent rights, which it would not otherwise possess, and relieves it from all responsibility for acts done in the revolted territory, or by the insurgent authorities (*a*).

§ 27c. Recognition of the Confederate States.

The United States have loudly and continually asserted that the recognition of the belligerency of the Confederates by Great Britain,

(*y*) [Lord Russell to Lord Lyons, 6th May, 1861. Parl. Papers N. America, 1873 (No. 2), p. 79].

(*z*) Montague Bernard, Neutrality of Great Britain during American Civil War, p. 115. See also Bluntschli in Revue de Droit International, 1870, pp. 455, 456].

(*a*) [Wheaton, by Dana, n. 15. Parl. Papers N. America, 1873 (No. 2), p. 75. Parl. Papers N. America, 1876 (No. 3), p. 19. Whiting, War Powers under the U. S. Constitution (43rd ed.), p. 333].

was an unfriendly act; but the right to accord it is not, and cannot be, denied. "A nation," said the President, in his annual message to Congress in 1869, "is its own judge when to accord the rights of belligerency, either to a people struggling to free themselves from a government they believe to be oppressive, or to independent nations at war with each other" (*b*). The course pursued by the British Government is not only justified by having been followed by all the chief maritime States, but was, under the circumstances, the only proper course. Hostilities commenced in April, 1861; on the 13th of April Fort Sumter had fallen, and on the 19th President Lincoln declared the ports of the seven provinces to be blockaded. No official copy of the proclamation of the blockade was received in England till the 10th of May, and Her Majesty's Proclamation of Neutrality, recognising the Confederates as belligerents, was not issued until the 14th of that month (*c*). When the intimate relation between the two countries is considered, it seems hardly possible to deny the propriety of this recognition. The rebellion "sprang forth suddenly from the parent brain, a Minerva in the full panoply of war," and the Supreme Court of the United States decided it was a war from the commencement of hostilities (*d*). The very fact of declaring a blockade was a virtual admission of the existence of a war; and after this, what objection could there be to foreign nations recognising it?

§ 27d. Recognition of independence.

A very different state of facts must exist before neutrals are justified in recognising an insurgent province as independent. "When a sovereign State, from exhaustion, or any other cause, has virtually and substantially abandoned the struggle for supremacy, it has no right to complain if a foreign State treat the independence of its former subjects as *de facto* established. When, on the other hand, the contest is not absolutely or permanently decided, a recognition of the inchoate independence of the insurgents by a foreign State, is a hostile act towards the sovereign State, which the latter is entitled to resent as a breach of neutrality and friendship" (*e*). It is to the facts of the case that foreign nations must look. The question with them ought to be, Is there a *bonâ fide* contest going on? If it has virtually ceased, the recognition of the insurgents is then at their discretion. It was upon this principle that England and the other powers acted, in recognising the independence of the South American Republics.

§ 27e. Independence of Greece and Belgium.

The action of some of the European powers towards Greece in 1827, and Belgium in 1830, was not a simple recognition of independence, and does not come within the preceding rule. In both cases the powers intervened to settle the disputes, and without this assistance the insurgents would not have succeeded. In the case of Greece, the intervention

(*b*) [Annual Message to Congress, 1869. See Parl. Papers N. America, 1872 (No. 2), p. 17].

(*c*) [See Sir A. Cockburn's Reasons for Dissenting from Geneva Award, Parl. Papers, 1873 (No. 2), pp. 73, 81. Report of Neutrality Laws Commission, 1869, p. 74. It is dated 13th May].

(*d*) [*The Prize Causes*, 2 Black. 669].

(*e*) [Letters of Historicus (Sir W. Harcourt), p. 9. See Phillimore, vol. ii. § xiii Despatch of Canning, State Papers, vol. xii. pp. 913–4. Speeches of Lord Lansdowne and Lord Liverpool, Hansard, vol. x. p. 970].

was based on the ground of humanity, and for the suppression of piracy and anarchy. In that of Belgium, the powers, by their own act at the treaty of Vienna, had united that country to Holland; but finding the union incompatible, they intervened to dissolve it.

§ 27f. Texas and Hungary.

The recognition of the independence of Texas by the United States, although it preceded that of other nations, did not take place until 1837, and all substantial struggle with Mexico was over early in 1836 (*f*). But in the case of the Hungarian revolt of 1849, the conduct of the United States, in investing an agent in Europe with power to declare the willingness of his government promptly to recognise the independence of Hungary in the event of her ability to maintain it, was unjustifiable towards Austria. The sympathy which the American people undoubtedly felt for the Hungarians should not have been thus expressed officially, more especially as the geographical situation of both countries prevented the United States being in any way concerned in the matter (*g*). Mr. Dana says that, "as a point of international law, the transaction has little significance;" and he adds that "the episode belongs rather to history, as indicating the policy and feeling of the United States" (*h*). This might be so if the American Union were an insignificant State; but it can scarcely be denied that if insurgents learn that the government of such a great power as the United States gives them its full sympathy, and is prepared to recognise their independence at the earliest possible moment, this may give the rebellion a very different complexion, and is almost sure to strengthen the hands of the rebels, and make it more difficult for the parent State to maintain its sovereignty.

§ 28. International effects of a change in the person of the sovereign, or in the internal constitution of the State.

The international effects produced by a change in the person of the sovereign, or in the form of government of any State may be considered:—

I. As to its treaties of alliance and commerce.

II. Its public debts.

III. Its public domain, and private rights of property.

IV. As to wrongs or injuries done to the government or citizens of another State.

§ 29. Treaties.

I. Treaties are divided by text writers into *personal* and *real*. The former relate exclusively to the persons of the contracting parties, such as family alliances and treaties guaranteeing the throne to a particular sovereign and his family. They expire, of course, on the death of the king or the extinction of his family. The latter relate solely to the subject-matters of the convention, independently of the per-

(*f*) [*Kennet* v. *Chambers*, 14 Howard, 38. Annuaire des Deux Mondes, 1837, p. 745. Webster's Works, vol. vi. p. 414].

(*g*) [Letters of Historicus, p. 5. President Taylor's Annual Message to Congress, 1849].

(*h*) [Wheaton, by Dana, n. 18, p. 47].

sons of the contracting parties. They continue to bind the State, whatever intervening changes may take place in its internal constitution, or in the persons of its rulers. The State continues the same, notwithstanding such change, and consequently the treaty relating to national objects remains in force so long as the nation exists as an independent State. The only exception to this general rule, as to *real* treaties, is where the convention relates to the form of government itself, and is intended to prevent any such change in the internal constitution of the State (*i*).

The correctness of this distinction between personal and real treaties, laid down by Vattel, has been questioned by more modern public jurists as not being logically deduced from acknowledged principles. Still it must be admitted that certain changes in the internal constitution of one of the contracting States, or in the person of its sovereign, may have the effect of annulling pre-existing treaties between their respective governments. The obligation of treaties, by whatever denomination they may be called, is founded, not merely upon the contract itself, but upon those mutual relations between the two States, which may have induced them to enter into certain engagements. Whether the treaty be termed real or personal, it will continue so long as these relations exist. The moment they cease to exist, by means of a change in the social organization of one of the contracting parties, of such a nature and of such importance as would have prevented the other party from entering into the contract had he foreseen this change, the treaty ceases to be obligatory upon him.

§ 29a. Binding effect of treaties.

On the separation of Belgium and Holland, the United States deemed themselves justified in withdrawing from an agreement to accept the King of the Netherlands as umpire on the north-east boundary question. When Texas joined the United States, France and England intimated that she did not thereby cease to be bound by her treaties with them (*k*).

§ 30. Public debts.

II. As to public debts—whether due to or from the revolutionized State—a mere change in the form of government or in the person of the ruler, does not affect their obligation.

(*i*) Vattel, Droit des Gens, liv. ii. ch. 12, §§ 183—197.

(*k*) [Wheaton, by Dana, note 17, p. 48; Lord Aberdeen to Mr. Eliot, 3rd Dec. 1845].

The essential form of the State, that which constitutes it an independent community, remains the same; its accidental form only is changed. The debts being contracted in the name of the State, by its authorised agents, for its public use, the nation continues liable for them, notwithstanding the change in its internal constitution (*l*). The new government succeeds to the fiscal rights, and is bound to fulfil the fiscal obligations of the former government.

It becomes entitled to the public domain and other property of the State, and is bound to pay its debts previously contracted (*m*).

§ 30a. Payment of debts of territory ceded by treaty.

Most treaties relating to the transfer of territory contain a clause providing for the payment of the debts of the territory ceded. Thus, when Holland and Belgium were united in 1814, it was provided that the new Kingdom of the Netherlands should be responsible for the debts of both countries (*n*). When Schleswig, Holstein, and Lauenburg were ceded by Denmark, in 1864, to Austria and Prussia, it was agreed between the parties that the debts of the Danish monarchy should be divided between Denmark and the ceded provinces, in proportion to the population of the two parts (*o*). On the acquisition by Italy of the Papal States, in 1864, and of Venice in 1866, she, in each case, took upon herself the debts of those provinces (*p*). In some cases territory has been transferred free from the general debt of the State it belonged to. This was the case when Saxe-Cobourg ceded Lichtenburg to Prussia in 1834, and when Austria, Sardinia, and some of the other Italian States, rectified their boundaries in 1844 (*q*). On the cession of Alsace and Lorraine by France, in 1871, Germany refused to take upon herself any share of the French national debt (*r*). By the treaty of Berlin, 1878, the portions of Turkish territory given to Servia and Montenegro were charged with a share of the Turkish debt. The portions given to Russia were not so charged, being taken as part payment of a war indemnity demanded by Russia from Turkey (*s*).

§ 31. Public domain and private rights of property.

III. As to the public domain and private rights of property. If the revolution be successful, and the internal change in the constitution of the State is finally confirmed by the event of the contest, the public domain passes to the new

(*l*) Grotius, de Jur. Bel. ac Pac. lib. ii. cap. 9, § viii. 1—3. Puffendorf, de Jur. Nat. et Gent. lib. viii. cap. 12, §§ 1, 2, 3.

(*m*) Heffter, Das Europaische Völkerrecht, § 24. Bona non intelliguntur nisi deducto ære alieno.

(*n*) [Art. VI. of the Treaty. See Hertslet, Map of Europe, vol. i. p. 38].

(*o*) [Annual Reg. 1864, p. 236].

(*p*) [Hertslet, Map of Europe, pp. 1628, 1721].

(*q*) [Hertslet, Map of Europe, vol. ii. pp. 948 and 1062].

(*r*) [Calvo, vol. ii., p 202.]

(*s*) [Parl. papers, Turkey (No. 41), 1878, and Turkey (No. 22), 1878.]

government; but this mutation is not necessarily attended with any alteration whatever in private rights of property.

It may, however, be attended by such a change: it is competent for the national authority to work a transmutation, total or partial, of the property belonging to the vanquished party; and if actually confiscated, the fact must be taken for right. But to work such a transfer of proprietary rights, some positive and unequivocal act of confiscation is essential.

If, on the other hand, the revolution in the government of the State is followed by a restoration of the ancient order of things, both public and private property, not actually confiscated, revert to the original proprietor on the restoration of the legitimate government, as in the case of conquest they revert to the former owners, on the evacuation of the territory occupied by the public enemy. The national domain, not actually alienated by any intermediate act of the State, returns to the sovereign along with the sovereignty. Private property, temporarily sequestered, returns to the former owner, as in the case of such property recaptured from an enemy in war on the principle of the *jus postliminii*.

But if the national domain has been alienated, or the private property confiscated by some intervening act of the State, the question as to the validity of such transfer becomes more difficult of solution.

Even the lawful sovereign of a country may, or may not, by the particular municipal constitution of the State, have the power of alienating the public domain. The general presumption, in mere internal transactions with his own subjects, is, that he is not so authorized (*s*). But in the case of international transactions, where foreigners and foreign governments are concerned, the authority is presumed to exist, and may be inferred from the general treaty-making power, unless there be some express limitation in the fundamental laws of the State. So, also, where foreign governments and their subjects treat with the actual head of the State, or the government *de facto*, recognized by the acquiescence of the nation, for the acquisition of any portion of the public domain or of private confiscated property, the acts of such government must, on principle, be considered valid by the lawful sovereign on

(*s*) Puffendorf, de Jur. Nat. et Gent. lib. viii. cap. 12, §§ 1—3. Vattel, Droit des Gens, liv. i. chap. 21, §§ 260, 261.

his restoration, although they were the acts of him who is considered by the restored sovereign as an usurper (*t*). On the other hand, it seems that such alienations of public or private property to the subjects of the State, may be annulled or confirmed, as to their internal effects, at the will of the restored legitimate sovereign, guided by such motives of policy as may influence his counsels, reserving the legal rights of *bonæ fidei* purchasers under such alienation to be indemnified for ameliorations (*u*).

Where the price or equivalent of the property sold or exchanged has accrued to the actual use and profit of the State, the transfer may be confirmed, and the original proprietors indemnified out of the public treasury, as was done in respect to the lands of the emigrant French nobility, confiscated and sold during the revolution. So, also, the sales of the national domains situate in the German and Belgian provinces, united to France during the revolution, and again detached from the French territory by the treaties of Paris and Vienna in 1814 and 1815, or in the countries composing the Rhenish confederation in the kingdom of Italy, and the Papal States, were, in general, confirmed by these treaties, by the Germanic Diet, or by the acts of the respective restored sovereigns. But a long and intricate litigation ensued before the Germanic Diet, in respect to the alienation of the domains in the countries composing the kingdom of Westphalia. The Elector of Hesse Cassel and the Duke of Brunswick refused to confirm these alienations in respect to their territory, whilst Prussia, which power had acknowledged the King of Westphalia, also acknowledged the validity of his acts in the countries annexed to the Prussian dominions by the treaties of Vienna (*x*).

§ 31 a. Opinion of James, V.C.

"I apprehend it," said Vice-Chancellor James, "to be clear public universal law, that any government which *de facto* succeeds to any other government, whether by revolution or restoration, conquest or reconquest, succeeds to all the public property, to everything in the nature of public property, and to all rights in respect of the public property of the displaced power, whatever may be the nature or origin of the title of

(*t*) Grotius, de Jur. Bel. ac Pac. lib. ii. cap. 14, § 16.

(*u*) Klüber, Droit des Gens, sec. ii. ch. 1, § 258.

(*x*) Conversations Lexikon, art. *Domainen-verkauf.* Heffter, Das Europäische Völkerrecht, § 188. Kluber, offentliches Recht des deutschen Bundes, § 169. Rotteck und Welcker, Staats-Lexikon, art. *Domainen-kaufer.*

such displaced power. This right of succession is a right not paramount, but derived through the suppressed authority, and can only be enforced in the same way, and to the same extent, and subject to the same correlative obligations and rights, as if that authority had not been suppressed, and was itself seeking to enforce it" (*y*).

§ 32. Wrongs and injuries.

IV. As to wrongs or injuries done to the government or citizens of another State;—it seems, that, on strict principle, the nation continues responsible to other States for the damages incurred for such wrongs or injuries, notwithstanding an intermediate change in the form of its government, or in the persons of its rulers. This principle was applied in all its rigour by the victorious allied powers in their treaties of peace with France in 1814 and 1815. More recent examples of its practical application have occurred in the negotiations between the United States and France, Holland, and Naples, relating to the spoliations committed on American commerce under the government of Napoleon and the vassal States connected with the French empire. The responsibility of the restored government of France for those acts of the preceding ruler was hardly denied by it, even during the reigns of the Bourbon kings of the elder branch, Louis XVIII. and Charles X.; and was expressly admitted by the present government (Louis Philippe's) in the treaty of indemnities concluded with the United States, in 1831. The application of the same principle to the measures of confiscation adopted by Murat in the kingdom of Naples was contested by the restored government of that country; but the discussions which ensued were at last terminated, in the same manner, by a treaty of indemnities concluded between the American and Neapolitan governments.

§ 33. Sovereign States defined.

A Sovereign State is generally defined to be any nation or people, whatever may be the form of its internal constitution, which governs itself independently of foreign powers (*z*).

This definition, unless taken with great qualifications, cannot be admitted as entirely accurate. Some States are completely sovereign and independent, acknowledging no superior but the Supreme Ruler and Governor of the universe.

(*y*) [*U. S.* v. *McRae*, L. R. 8 Eq. 75; *Terrett* v. *Taylor*, 9 Cranch, 50; *Kelly* v. *Harrison*, 2 Johnson's cases, 29; *Calvin's case*, 7 Coke Rep. 27; *Strother* v. *Lucas*, 12 Peters, 410; *King of the Two Sicilies* v. *Wilcox*, 1 Simons, N. S. 302].

(*z*) Vattel, Droit des Gens, liv. i. chap. 1, § 4.

The sovereignty of other States is limited and qualified in various degrees.

§ 33a. "By a Sovereign State, we mean," says Prof. Montague Bernard (*a*), "a community or number of persons permanently organised under a sovereign government of their own; and by a sovereign government we mean a government, however constituted, which exercises the power of making and enforcing law within a community, and is not itself subject to any superior government. These two factors, one positive the other negative—the exercise of power, and the absence of superior control—compose the notion of sovereignty, and are essential to it."

Equality of sovereign States.

All Sovereign States are equal in the eye of international law, whatever may be their relative power. The sovereignty of a particular State is not impaired by its occasional obedience to the commands of other States, or even the habitual influence exercised by them over its councils. It is only when this obedience, or this influence, assumes the form of express compact, that the sovereignty of the State, inferior in power, is legally affected by its connection with the other. Treaties of equal alliance, freely contracted between independent States, do not impair their sovereignty. Treaties of unequal alliance, guarantee, mediation, and protection, may have the effect of limiting and qualifying the sovereignty according to the stipulations of the treaties.

§ 34. Semi-sovereign States.

States which are thus dependent on other States, in respect to the exercise of certain rights, essential to the perfect external sovereignty, have been termed semi-sovereign States (*b*).

City of Cracow.

Thus the city of Cracow, in Poland, with its territory, was declared by the Congress of Vienna to be a perpetually free, independent, and neutral State, under the protection of Russia, Austria, and Prussia (*c*).

By the final act of the Congress of Vienna, Art. 9, the three great powers, Austria, Russia, and Prussia, mutually engaged to respect, and cause to be respected, at all times, the neutrality of the free city of Cracow and its territory; and they further declared that no armed force should ever be introduced into it under any pretext whatever.

It was at the same time reciprocally understood and ex-

(*a*) [Neutrality of Great Britain during American Civil War, p. 107].
(*b*) Klüber, Droit des Gens moderne de l'Europe, § 24. Heffter, Das Europäische Völkerrecht, § 19.
(*c*) Acte du Congrès de Vienne du 9 Juin, 1815, Art. 6, 9, 10.

pressly stipulated that no asylum or protection should be granted in the free city or upon the territory of Cracow to fugitives from justice, or deserters from the dominions of either of the said high powers, and that upon a demand of extradition being made by the competent authorities, such individuals should be arrested and delivered up without delay under sufficient escort to the guard charged to receive them at the frontier (*d*).

§ 35. United States of the Ionian Islands.

By the convention concluded at Paris on the 5th of November, 1815, between Austria, Great Britain, Prussia, and Russia, it is declared (Art. 1,) that the islands of Corfu, Cephalonia, Zante, St. Maura, Ithaca, Cerigo and Paxo, with their dependencies, shall form a single, free, and independent State, under the denomination of the United States of the Ionian Islands. The second article provides that this State shall be placed under the immediate and exclusive protection of His Majesty the King of the United Kingdom of Great Britain and Ireland, his heirs and successors. By the third article it is provided that the United States of the Ionian Islands shall regulate, with the approbation of the protecting power, their interior organization: and to give all parts of this organization the consistency and necessary action, His Britannic Majesty will devote particular attention to the legislation and general administration of those States. He will appoint a Lord High Commissioner who shall be invested with the necessary authority for this purpose. The fourth article declares, that, in order to carry into effect without delay these stipulations, the Lord High Commissioner shall regulate the forms of convoking a legislative assembly, of which he shall direct the operations, in order to frame a new constitutional charter for the State, to be ratified by His Britannic Majesty. The fifth article stipulates, that, in order to secure to the inhabitants of the United States of the Ionian Islands the advantages resulting from the high protection under which they are placed, as well as for the exercise of the

(*d*) Martens, Nouveau Recueil, tome ii. p. 386. Klüber, Acten des Wiene Congresses, Band V. § 138. By a Convention, signed at Vienna, Nov. 6, 1846, between Russia, Austria, and Prussia, the city of Cracow was annexed to the Empire of Austria. The governments of Great Britain, France, and Sweden protested against this proceeding as a violation of the Federal act of 1815. [See Hertslet, Map of Europe, vol. ii. pp. 1065, 1073.]

rights incident to this protection, His Britannic Majesty shall have the right of occupying and garrisoning the fortresses and places of the said States. Their military forces shall be under the orders of the commander of the troops of His Britannic Majesty. The sixth article provides that a special convention with the government of the United States of the Ionian Islands shall regulate, according to their revenues, the object relating to the maintenance of the fortresses and the payment of the British garrisons, and their numbers in the time of peace. The same convention shall also ascertain the relations which are to subsist between this armed force and the Ionian government. The seventh article declares that the merchant flag of the Ionian Islands shall bear, together with the colours and arms it bore previous to 1807, those which His Britannic Majesty may grant as a sign of the protection under which the United Ionian States are placed; and to give more weight to this protection, all the Ionian ports are declared, as to honorary and military rights, to be under the British jurisdiction, commercial agents only, or consuls charged only with the care of commercial relations, shall be accredited to the United States of the Ionian Islands; and they shall be subject to the same regulations to which consuls and commercial agents are subject in other independent States (*e*).

On comparing this act with the stipulations of the treaty of Vienna relating to the republic of Cracow, a material distinction will be perceived between the nature of the respective sovereignty granted to each of these two States. The "free, independent, and strictly neutral city of Cracow" was completely sovereign, though under the protection of Austria, Prussia, and Russia; whilst the Ionian Islands, although they formed "a single free and independent State," under the protection of Great Britain, were closely connected with the protecting power both by the treaty itself and by the constitution framed in pursuance of its stipulations, in such a manner as materially to abridge both its internal and external sovereignty. In practice, the United States of the Ionian Islands were not only constantly obedient to the commands of the protecting power, but they were governed as a British colony

(*e*) Martens, Nouveau Recueil, tome ii. p. 663.

by a Lord High Commissioner named by the British crown, who exercised the entire executive, and participated in the legislative power with the Senate and legislative Assembly, under the constitution of the State (*f*).

§ 35 a. *Status* of Ionian citizens.

During the Crimean war two Ionian vessels were captured by British ships on a voyage to Taganrog, and their condemnation was demanded on the ground that Ionians were in the same position as British subjects as regards trade with the enemy. The Court held that the *status* of the Ionian Islands, and their relation to Great Britain were regulated exclusively by the Treaty of Paris, 1815. That Great Britain had the power to make peace or war for them, but that the intention to place them in a state of war must be clearly expressed, as they did not become so *ex necessitate* from Great Britain being at war. The ships were therefore released, as the Ionians, being deemed neither British subjects nor allies, were entitled to trade with Russia during the war, England never having expressly declared the Islands to be at war with Russia (*g*). These Islands were ceded to Greece in 1864, and have since ceased to exist as a semi-sovereign State (*h*).

§ 36. Other semi-sovereign States.

Besides the free city of Cracow and the United States of the Ionian Islands, several other semi-sovereign or dependent States are recognized by the existing public law of Europe. These are :—

1. The principalities of Moldavia, Wallachia, and Servia, under the *suzeraineté* of the Ottoman Porte and the protectorate of Russia, as defined by the successive treaties between these two powers, confirmed by the treaty of Adrianople, 1829 (*i*).

§ 36 a. Cession of Russian protectorate.

Union of Moldavia and Wallachia.

The Russian protectorate over these provinces ceased in 1854, and the privileges accorded to them by the Sultan were thenceforward placed under the collective guarantee of the five great Powers (*j*). By a convention entered into in 1858, between Turkey and the Powers, Moldavia and Wallachia were placed under the Suzerainty of the Sultan, but carried on their own administration freely, and exempt from any interference of the Sublime Porte, within the limits stipulated by the agreement of the guaranteeing Powers with the Suzerain Court. An annual tribute was paid to Turkey by each province. The executive power was vested in a Hospodar, and in the event of any of the immunities of the principali-

(*f*) Martens, Précis du Droit des Gens, liv. i. ch. 2, § 20. Note *a*, 3me édition.

(*g*) [*The Ionian ships*, 1 Spinks, 193. See also Forsyth, Cases and Opinions, p. 472].

(*h*) [Hertslet, Map of Europe, vol. iii. p. 1610].

(*i*) Wheaton's Hist. of the Law of Nations, pp. 556—560.

(*j*) [Hertslet, Map of Europe by Treaty, vol. ii. p. 1225].

ties being violated, the Hospodar was first to represent this to the Suzerain Power, and if not attended to, he might then communicate with the guaranteeing Powers. The Hospodar was represented at Constantinople by diplomatic agents (*Capou-Kiaga*) accepted by the Porte (*k*). In 1861, Moldavia and Wallachia were formed into one Principality, called Roumania. In 1877, Roumania joined Russia in the war with Turkey, and at the end of this war she declared herself independent of the Porte. This independence was recognised and confirmed by the Powers in the Treaty of Berlin, and Roumania is now no longer a semi-sovereign, but has become an independent State (*l*).

§ 36 b. Servia and Montenegro.

The history of Servia has been very similar. After various abortive efforts she at length attained to complete independence, which the Powers confirmed at the same time as that of Roumania (*m*). The Treaty of Berlin also declared Montenegro to be an independent State (*n*).

Bulgaria.

A new semi-sovereign State was created by this Treaty, to which the name of Bulgaria was given. It has a local government and a national militia, but is tributary to the Sultan. The Prince is elected by the people, but confirmed by the Porte with the assent of the Powers. The Sultan is not permitted to keep his army in the province (*o*).

Monaco.

2. The Principality of Monaco, which had been under the protectorate of France from 1641 until the French Revolution, was replaced under the same protection by the Treaty of Paris, 1814, (Art. 3,) for which was substituted that of Sardinia by the Treaty of Paris, 1815, (Art. 1,) (*p*).

In 1861, the Prince of Monaco sold a portion of his territory to France, and the principality now consists of little more than the town of Monaco itself. It still continues as a semi-Sovereign State (*q*).

Polizza.

3. The Republic of Polizza in Dalmatia, under the protectorate of Austria (*r*).

The former German Empire.

4. The former Germanic Empire was composed of a great number of States, which, although enjoying what was called territorial superiority, (*Landeshoheit*,) could not be considered as completely sovereign, on account of their subjection to the legislative and judicial power of the emperor and the empire.

(*k*) [Convention of 19th Aug. 1858. Hertslet, Map of Europe by Treaty, vol. ii. p. 1329].
(*l*) [Treaty of Berlin, Art. xliii. Parl. Papers, Turkey, 1878, No. 44, p. 25.]
(*m*) [Art. xxxiv].
(*n*) [Art. xxvi].
(*o*) [Arts. i. to xii. See also Appendix F as to this Treaty.]
(*p*) Martens, Nouveau Recueil, tom. ii. pp. 5, 687.
(*q*) [Hertslet, Map of Europe by Treaty, vol. ii. p. 1462].
(*r*) Martens, Précis du Droit des Gens, liv. i. ch. 2, § 20. [There is no longer any question as to Polizza. It is now absorbed into Austria. Heffter, § 20, n. 2; Wheaton, by Lawrence, n. 26.]

These were all absorbed in the sovereignty of the States composing the late Germanic Confederation, with the exception of the Lordship of Kniphausen, on the North Sea, which retained its former feudal relation to the Grand Duchy of Oldenburg, and might, therefore, have been considered as a semi-sovereign State (*r*).

Egypt.

5. Egypt had been held by the Ottoman Porte, during the dominion of the Mamelukes, rather as a vassal State than as a subject province. The attempts of Mehemet Ali, after the destruction of the Mamelukes, to convert his title as a prince-vassal into absolute independence of the Sultan, and even to extend his sway over other adjoining provinces of the empire, produced the convention concluded at London the 15th July, 1840, between four of the great European powers,—Austria, Great Britain, Prussia, and Russia,—to which the Ottoman Porte acceded. In consequence of the measures subsequently taken by the contracting parties for the execution of this treaty, the hereditary Pashalick of Egypt was finally vested by the Porte in Mehemet Ali, and his lineal descendants, on the payment of an annual tribute to the Sultan, as his *suzerain*. All the treaties and all the laws of the Ottoman Empire were to be applicable to Egypt, in the same manner as to other parts of the empire. But the Sultan consented that, on condition of the regular payment of this tribute, the Pasha should collect, in the name and as the delegate of the Sultan, the taxes and imposts legally established, it being, moreover, understood that the Pasha should defray all the expenses of the civil and military administration; and that the military and naval force maintained by him should always be considered as maintained for the service of the State (*s*).

§ 36c Present *status* of Egypt.

The international position of Egypt was recently discussed by Sir R. Phillimore in the Admiralty Court. After examining all the firmans of the Porte, and the other authorities on the subject, his lordship said that "the result of the historical inquiry as to the *status* of His Highness the Khedive, is as follows: That in the firmans, whose authority upon this point appears to be paramount, Egypt is invariably spoken of as one of the provinces of the Ottoman Empire; that the Egyptian army is regulated as part of the military force of the Ottoman Empire; that the taxes

(*r*) Heffter, Das Europäische Völkerrecht, § 19.
(*s*) Wheaton, Hist. Law of Nations, pp. 572—583.

are imposed and levied in the name of the Porte; that the treaties of the Porte are binding upon Egypt, and that she has no separate *jus legationis;* that the flag for both the army and the navy is the flag of the Porte. All these facts, according to the unanimous opinion of accredited writers, are inconsistent and incompatible with those conditions of sovereignty which are necessary to entitle a country to be ranked as one among the great community of States" (*t*). The Khedive has, since the judgment in this case was delivered, obtained from the Sultan a new firman, granting him some powers of sovereignty he did not before possess, and whose absence was commented on by Sir R. Phillimore (*u*). A contingent of Egyptian troops was sent to serve with the Turkish army in the recent war with Russia (1877).

§ 36d. Republics of San Marino and Andorre.

Another semi-Sovereign State is the Republic of San Marino, which was formerly under the protection of the Holy See, but which is now under that of Italy (*x*). Andorre, which is sometimes included among semi-Sovereign States, is a small independent republic situate on the Pyreneean frontier, between France and Spain (*y*).

§ 37. Tributary and vassal States.

Tributary States, and States having a feudal relation to each other, are still considered as sovereign, so far as their sovereignty is not affected by this relation. Thus, it is evident that the tribute, formerly paid by the principal maritime powers of Europe to the Barbary States, did not at all affect the sovereignty and independence of the former. So also the King of Naples had been a nominal vassal of the Papal See, ever since the eleventh century; but this feudal dependence, abolished in 1818, was never considered as impairing the sovereignty of the kingdom of Naples (*z*).

Relations between the Ottoman Porte and the Barbary States.

The political relations between the Ottoman Porte and the Barbary States are of a very anomalous character. Their occasional obedience to the commands of the Sultan, accompanied with the irregular payment of tribute, does not prevent them from being considered by the Christian powers of Europe and America as independent States, with whom the international relations of war and peace are maintained, on the same footing as with other Mohammedan sovereignties. During the Middle Ages, and especially in the time of the Crusades, they were considered as pirates:

"Bugia ed Algieri, infami nidi di corsari,"

(*t*) [*The Charkieh*, L. R. 4 A. & E. 84].
(*u*) [Phillimore, vol. iii., Introduction. *Journal des Debats*, 7th July, 1873].
(*x*) [Convention of 22nd March, 1862. See Hertslet, Map of Europe, vol. p. 1508].
(*y*) [Ibid. vol. ii. p. 1510. State Papers, vol. xxx. p. 1217].
(*z*) Ward's Hist. of the Law of Nations, vol. ii. p. 69.

as Tasso calls them. But they have long since acquired the character of lawful powers, possessing all those attributes which distinguish a lawful State from a mere association of robbers (*a*). "The Algerines, Tripolitans, Tunisians, and those of Salee," says Bynkershoek, "are not pirates, but regular organized societies, who have a fixed territory and an established government, with whom we are alternately at peace and at war, as with other nations, and who, therefore, are entitled to the same rights as other independent States. The European sovereigns often enter into treaties with them, and the States-General have done it in several instances. Cicero defines a regular enemy to be: *Qui habet rempublicam, curiam, ærarium, consensum et concordiam civium, rationem aliquam, si res ità tulisset, pacis et fœderis.*. (Philip. 4, c. 14.) All these things are to be found among the barbarians of Africa; for they pay the same regard to treaties of peace and alliance that other nations do, who generally attend more to their convenience than to their engagements. And if they should not observe the faith of treaties *with the most scrupulous respect*, it cannot be well required of them; for it would be required in vain of other sovereigns. Nay, if they should even act with more injustice than other nations do, they should not, on that account, as Huberus very properly observes, (De Jure Civitat. l. iii. c. 5, § 4, n. ult.) lose the rights and privileges of sovereign States (*b*).

§ 38. North American Indians.

The political relation of the Indian nations on this continent towards the United States, is that of semi-sovereign States, under the exclusive protectorate of another power. Some of these savage tribes have wholly extinguished their national fire, and submitted themselves to the laws of the States within whose territorial limits they reside; others have acknowledged, by treaty, that they hold their national existence at the will of the State; others retain a limited sovereignty, and the absolute proprietorship of the soil. The latter is the case with the tribes to the west of Georgia (*c*).

Thus, the Supreme Court of the United States determined, in 1831, that, though the Cherokee nation of Indians, dwelling

(*a*) Sir L. Jenkins's Works, vol. ii. p. 791. *The Helena*, 4 C. Rob. 5.
(*b*) Bynkershoek, Quæst. Jur. Pub. lib. i. cap. xvii.
(*c*) *Fletcher* v. *Peck*, 6 Cranch, 146.

within the jurisdictional limits of Georgia, was not a "foreign State" in the sense in which that term is used in the Constitution, nor entitled, as such, to proceed in that Court against the State of Georgia, yet the Cherokees constituted *a State*, or a distinct political society, capable of managing its own affairs, and governing itself, and that they had uniformly been treated as such since the first settlement of the country. The numerous treaties made with them by the United States recognize them as a people capable of maintaining the relations of peace and war, and responsible in their political capacity. Their relation to the United States was nevertheless peculiar. They were a domestic dependent nation; their relation to us resembled that of a ward to his guardian; and they had an unquestionable right to the lands they occupied, until that right should be extinguished by a voluntary cession to our government (*d*).

The same decision was repeated by the Supreme Court, in another case, in 1832. In this case, the Court declared that the British crown had never attempted, previous to the Revolution, to interfere with the national affairs of the Indians, farther than to keep out the agents of foreign powers, who might seduce them into foreign alliances. The British government purchased the alliance and dependence of the Indian nations by subsidies, and purchased their lands, when they were willing to sell, at the price they were willing to take, but it never coerced a surrender of them. The British crown considered them as nations, competent to maintain the relations of peace and war, and of governing themselves under its protection. The United States, who succeeded to the rights of the British crown, in respect to the Indians, did the same, and no more; and the protection stipulated to be afforded to the Indians, and claimed by them, was understood by all parties as only binding the Indians to the United States, as dependent allies. A weak power does not surrender its independence and right to self-government, by associating with a stronger and taking its protection. This was the settled doctrine of the Law of Nations, and the Supreme Court therefore concluded and adjudged, that the

(*d*) *The Cherokee Nation* v. *The State of Georgia*, 5 Peters, 1. [See also *The State of Georgia* v. *Stanton*, 6 Wallace, 71].

Cherokee nation was a distinct community, occupying its own territory, with boundaries accurately described, within which the laws of Georgia could not rightfully have any force, and into which the citizens of that State had no right to enter but with the assent of the Cherokees themselves, or in conformity with treaties, and with the acts of Congress (*e*).

§ 38 a. Present *status* of the Indians.

More recent cases have established that the Indians residing within the limits of the United States are subject to their authority; and where the country occupied by them is not within the limits of one of the States, Congress may, by law, punish any offence committed there, whether the offender be an Indian or a white man (*f*). An Act of Congress of the year 1872 declares, that "no Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe, or power, with whom the United States may contract by treaty; but no obligation of any treaty lawfully made and ratified with any such Indian nation or tribe prior to March 3rd, 1871, shall be hereby invalidated or impaired" (*g*). The Indians are, however, protected in the territories retained by them. Thus every person who makes a settlement on any lands secured or granted by treaty with the United States to any Indian tribe, is liable to a penalty of 1000 dollars (*h*). No one but an Indian may trade in their territory without a license (*i*); and even hunting there is prohibited (*k*).

§ 39. Single or united States.

States may be either single, or may be united together under a common sovereign prince, or by a federal compact.

§ 40. *Personal* union under the same sovereign.

1. If this union under a common sovereign is not an incorporate union, that is to say, if it is only *personal* in the reigning sovereign; or even if it is *real*, yet if the different component parts are united with a perfect equality of rights, the sovereignty of each State remains unimpaired (*l*).

Thus, the kingdom of Hanover was formerly held by the king of the United Kingdom of Great Britain and Ireland, separately from his insular dominions. Hanover and the

(*e*) Kent's Comment. on American Law, vol. iii. p. 383 (12th ed.).

(*f*) [*U. S.* v. *Rogers*, 4 Howard, 572; *Mackey* v. *Coxe*, 18 Howard, 104; *Holden* v. *Joy*, 17 Wallace, 211; *U. S.* v. *Holliday*, 3 Wallace, 407; Abbott's National Digest, vol. iii. Tit. Indians].

(*g*) [U. S. Revised Statutes. Title, xxviii. Indians. ch. ii. sec. 2079].

(*h*) [Ibid. ch. iii. sec. 2118; *Worcester* v. *State of Georgia*, 6 Peters, 515; *Clark* v. *Smith*, 13 Peters, 195; *Latimer* v. *Poteet*, 14 Peters, 4; *U. S.* v. *Joseph*, 4 Otto, 614].

(*i*) [Ibid. ch. iv. sec. 2133].

(*k*) [Ibid. sec. 2137. See also the recent cases of *Holden* v. *Joy*, 17 Wallace, 211; *U. S.* v. *Cook*, 19 Wallace, 591].

(*l*) Grotius, de Jur. Bel. ac. Pac. lib. ii. cap. 9, §§ 8, 9. Kluber, Droit des Gens moderne de l'Europe, Part I. cap. 1, § 27. Heffter, Das Europäische Volkerrecht, § 20.

United Kingdom were subject to the same prince, without any dependence on each other, both kingdoms retaining their respective national rights of sovereignty. It was thus that the King of Prussia was also sovereign prince of Neufchatel, one of the Swiss Cantons; which did not, on that account, cease to maintain its relations with the Confederation, nor was it united with the Prussian monarchy (*m*).

So, also, the kingdoms of Sweden and Norway are united under one crowned head, each kingdom retaining its separate constitution, laws, and civil administration, the external sovereignty of each being represented by the king.

§ 41. *Real* union under the same sovereign.

The union of the different States composing the Austrian monarchy is a *real* union. The hereditary dominions of the House of Austria, the kingdoms of Hungary and Bohemia, the Lombardo-Venetian kingdom, and other States, are all indissolubly united under the same sceptre, but with distinct fundamental laws, and other political institutions.

It appears to be an intelligible distinction between such a union as that of the Austrian States, and all other unions which are merely *personal* under the same crowned head, that, in the case of a *real* union, though the separate sovereignty of each State may still subsist internally, in respect to its co-ordinate States, and in respect to the imperial crown; yet the sovereignty of each is merged in the general sovereignty of the empire, as to their international relations with foreign powers. The political unity of the States which compose the Austrian Empire forms what the German publicists call a community of States (*Gesammtstaat*); a community which reposes on historical antecedents. It is connected with the natural progress of things, in the same way as the empire was formed, by an agglomeration of various nationalities, which defended, as long as possible, their ancient constitutions, and only yielded, finally, to the overwhelming influence of superior force.

§ 41a. Constitution of the Austro-Hungarian monarchy.

Since the year 1867, the Austro-Hungarian monarchy, as it is now called, forms a bipartite State, consisting of a German, or "Cisleithan" monarchy, and a Magyar, or "Transleithan" kingdom, the former officially designated as Austria, and the latter as Hungary. Each of the

(*m*) [This sovereignty was renounced by the King of Prussia in 1857, and Neufchatel has since formed part of the Swiss Confederation, on the same footing as the other cantons. See Hertslet, Map of Europe, vol. ii. p. 1317].

two countries has its own parliament, ministers, and government, while the connecting ties between them consists in the person of the hereditary sovereign, in a common army, navy, and diplomacy, and in a controlling body known as the delegations. The delegations form a parliament of 120 members, one-half of whom are chosen by, and represent, the legislature of Austria, and the other half that of Hungary, the Upper House of each returning 20, and the Lower House 40 delegates. On subjects affecting the common affairs, the delegations have a decisive vote, and their resolutions require neither the confirmation nor the approbation of the representative assemblies in which they have their source. The jurisdiction of the delegations is limited to foreign affairs and war, and their final vote on these points is binding upon the whole empire (*n*).

§ 42. Incorporate union.

2. An *incorporate* union is such as that which subsists between Scotland and England, and between Great Britain and Ireland; forming out of the three kingdoms an empire, united under one crown and one legislature, although each may have distinct laws and a separate administration. The sovereignty, internal and external, of each original kingdom is completely merged in the United Kingdom, thus formed by their successive unions.

§ 43. Union between Russia and Poland.

3. The union established by the Congress of Vienna, between the empire of Russia and the kingdom of Poland, is of a more anomalous character. By the final act of the congress, the duchy of Warsaw, with the exception of the provinces and districts otherwise disposed of, was reunited to the Russian Empire; and it was stipulated that it should be irrevocably connected with that empire by its constitution, to be possessed by his majesty the Emperor of all the Russias, his heirs and successors in perpetuity, with the title of King of Poland; his Majesty reserving the right to give to this State, enjoying a distinct administration, such interior extension as he should judge proper; and that the Poles, subject respectively to Russia, Austria, and Prussia, should obtain a representation and national institutions, regulated according to that mode of political existence which each government, to whom they belong, should think useful and proper to grant (*o*).

(*n*) [The Statesman's Year-Book, 1877. Martin. Tit. Austria-Hungary. And see The Austro-Hungarian Empire. Baron de Worms (1877)].

(*o*) "Le Duché de Varsovie, à l'exception des provinces et districts, dont il a été autrement disposé dans les articles suivans, est réuni à l'Empire de Russie. Il y sera lié irrévocablement par sa Constitution, pour être possédé par S. M. l'Empereur de toutes les Russies, ses héritiers et ses successeurs à

Charter accorded by the Emperor Alexander to the kingdom of Poland, in 1815.

In pursuance of these stipulations, the Emperor Alexander granted a constitutional charter to the kingdom of Poland, on 15th (27th) November, 1815. By the provisions of this charter, the kingdom of Poland was declared to be united to the Russian Empire by its constitution; the sovereign authority in Poland was to be exercised only in conformity to it; the coronation of the King of Poland was to take place in the Polish capital, where he was bound to take an oath to observe the charter. The Polish nation was to have a perpetual representation, composed of the king and the two chambers forming the Diet; in which body the legislative power was to be vested, including that of taxation. A distinct Polish national army and coinage, and distinct military orders were to be preserved in the kingdom.

Manifesto of the Emperor Nicholas, 1832.

In consequence of the revolution and reconquest of Poland by Russia, a manifesto was issued by the Emperor Nicholas, on the 14th (26th) of February, 1832, by which the kingdom of Poland was declared to be perpetually united (*réuni*) to the Russian Empire, and to form an integral part thereof; the coronation of the emperors of Russia and kings of Poland hereafter to take place at Moscow, by one and the same act; the Diet to be abolished, and the army of the empire and of the kingdom to form one army, without distinction of Russian or Polish troops; Poland to be separately administered by a Governor-General and Council of Administration, appointed by the emperor, and to preserve its civil and criminal code, subject to alteration and revision by laws and ordinances prepared in the Polish Council of State, and subsequently examined and confirmed in the Section of the Council of State of the Russian Empire, called *The Section for the Affairs of Poland;* consultative Provincial States to be established in the different Polish provinces, to deliberate upon such affairs concerning the general interest of the kingdom of Poland as might be submitted to their consideration; the Assemblies of

perpétuité. Sa Majesté Impériale se reserve de donner à cet état, jouissant d'une administration distincte, l'extension intérieure qu'elle jugera convenable. Elle prendra, avec ses autres titres, celui de Czar, Roi de Pologne, conformément au protocole usité et consacré par les titres attachés à ses autres possessions.

"Les Polonais, sujets respectifs de la Russie, de l'Autriche, et de la Prusse, obtiendront une représentation et des institutions nationales, réglées d'après la mode d'existence politique que chacun des Gouvernemens auxquelles ils appartiennent jugera utile et convenable de leur accorder."—*Art.* 1.

the Nobles, Communal Assemblies, and Council of the Waiwodes to be continued as formerly. Great Britain and France protested against this measure of the Russian government, as an infraction of the spirit if not of the letter of the treaties of Vienna (*p*).

§ 44. Federal union.

4. Sovereign States permanently united together by a federal compact, either form a *system of confederated States* (properly so called), or a *supreme federal government*, which has been sometimes called a *compositive State* (*q*).

§ 45. Confederated States, each retaining its own sovereignty.

In the first case, the several States are connected together by a compact, which does not essentially differ from an ordinary treaty of equal alliance. Consequently the internal sovereignty of each member of the union remains unimpaired; the resolutions of the federal body being enforced, not as laws directly binding on the private individual subjects, but through the agency of each separate government, adopting them, and giving them the force of law within its own jurisdiction. Hence it follows, that each confederated individual State, and the federal body for the affairs of common interest, may become, each in its appropriate sphere, the object of distinct diplomatic relations with other nations.

§ 46. Supreme federal government or compositive State.

In the second case, the federal government created by the act of union is sovereign and supreme, within the sphere of the powers granted to it by that act; and the government acts not only upon the States which are members of the confederation, but directly on the citizens. The sovereignty, both internal and external, of each several State is impaired by the powers thus granted to the federal government, and the limitations thus imposed on the several State governments. The compositive State, which results from this league, is alone a sovereign power.

§ 47. Germanic Confederation.

Germany, as it was constituted under the name of the Germanic Confederation, presented the example of a system of sovereign States, united by an equal and permanent Confederation. All the sovereign princes and free cities of Germany, including the Emperor of Austria and the King of Prussia, in respect to their possessions which formerly be-

(*p*) Wheaton's History of the Law of Nations, p. 434.

(*q*) These two species of federal compacts are very appropriately expressed in the German language, by the respective terms of *Staatenbund* and *Bundesstaat*.

longed to the Germanic Empire, the King of Denmark for the duchy of Holstein, and the King of the Netherlands for the grand duchy of Luxembourg, were united in a perpetual league, under the name of the Germanic Confederation, established by the Federal Act of 1815, and completed and developed by several subsequent decrees.

The object of this union was declared to be the preservation of the external and internal security of Germany, the independence and inviolability of the confederated States. All the members of the confederation, as such, were entitled to equal rights. New States might be admitted into the union by the unanimous consent of the members (*r*).

The affairs of the union were confided to a Federative Diet, which sat at Frankfort-on-the-Maine, in which the respective States were represented by their ministers, and were entitled to the following votes, in what was called the *Ordinary Assembly* of the Diet :—

	Votes.
Austria	1
Prussia	1
Bavaria	1
Saxony	1
Hanover	1
Wurtemburg	1
Baden	1
Electoral Hesse	1
The Grand Duchy of Hesse	1
Denmark (for Holstein)	1
The Netherlands (for Luxemburg)	1
The Grand Ducal and Ducal Houses of Saxony	1
Brunswick and Nassau	1
Mecklenburg-Schwerin and Strelitz	1
Oldenburg, Anhalt, and Schwartzburg	1
Hohenzollern, Lichtenstein, Reuss, Schaumburg, Lippe, Waldeck, and Hesse Homburg	1
The Free Cities of Lubeck, Frankfort, Bremen, and Hamburg	1
Total	17

Austria presided in the Diet, but each State had a right to propose any measure for deliberation.

(*r*) Acte final du Congrès de Vienne, art. 53, 54, 55. Deutsche Bundes acte, vom 8 Juni, 1815, art. 1. Wiener Schluss-Acte, vom 15 Mai, 1820, art. 1, 6.

The Diet was formed into what was called a *General Assembly* (*Plenum*), for the decision of certain specific questions. The votes *in pleno* were distributed as follows :—

	Votes.
Austria	4
Prussia	4
Saxony	4
Bavaria	4
Hanover	4
Wurtemburg	4
Baden	3
Electoral Hesse	3
The Grand Duchy of Hesse	3
Holstein	3
Luxemburg	3
Brunswick	2
Mecklenburg-Schwerin	2
Nassau	2
Saxe Weimar	1
Gotha	1
Coburg	1
Meinengen	1
Hilburghausen	1
Mecklenburg-Strelitz	1
Oldenburg	1
Anhalt-Dessau	1
Anhalt-Bernburg	1
Anhalt-Coethen	1
Schwartzburg-Sondershausen	1
Schwartzburg-Rudolstadt	1
Hohenzollern-Hechingen	1
Lichtenstein	1
Hohenzollern-Sigmaringen	1
Waldeck	1
Reuss (elder branch)	1
Reuss (younger branch)	1
Schaumburg-Lippe	1
Lippe	1
Hesse-Homburg	1
The Free City of Lubeck	1
Frankfort	1
Bremen	1
Hamburg	1
Total	70

Every question to be submitted to the general assembly of the Diet was first discussed in the ordinary assembly, where it

was decided by a majority of votes. But in the general assembly, (*in pleno*,) two thirds of all the votes were necessary to a decision. The ordinary assembly determined what subjects were to be submitted to the general assembly. But all questions concerning the adoption or alteration of the fundamental laws of the Confederation, or organic regulations establishing permanent institutions, as means of carrying into effect the declared objects of the union, or the admission of new members or concerning the affairs of religion, were submitted to the general assembly; and, in all these cases, absolute unanimity was necessary to a final decision (*s*).

The Diet had power to establish fundamental laws for the Confederation, and organic regulations as to its foreign, military, and internal relations (*t*).

All the States guaranteed to each other the possession of their respective dominions within the union, and engaged to defend, not only entire Germany, but each individual State, in case of attack. When war was declared by the Confederation, no State could negotiate separately with the enemy, nor conclude peace or an armistice, without the consent of the rest. Each member of the Confederation might contract alliances with other foreign States, provided they were not directed against the security of the Confederation, or the individual States of which it was composed. No State could make war upon another member of the union, but all the States were bound to submit their differences to the decision of the Diet. This body was to endeavour to settle them by mediation; and if unsuccessful, and a juridical sentence became necessary, resort was to be had to an austrëgal proceeding, (*Austrägal Instanz*,) to which the litigating parties were bound to submit without appeal (*u*).

Each country of the Confederation was entitled to a local constitution of States (*x*). The Diet might guarantee the constitution established by any particular State, upon its application; and thereby acquired the right of settling the differences which might arise respecting its interpretation or execution, either by mediation or judicial arbitration, unless

(*s*) Acte final, art. 58. Wiener Schluss-Acte, art. 12—15.
(*t*) Acte final, art. 62. (*u*) Ibid. art. 63.
(*x*) "In allen Bundestaaten wird eine landeständische Verfassung stattfinden." Bundes-Acte, art. 13.

such constitution should have provided other means of determining controversies of this nature (*y*).

In case of rebellion or insurrection, or imminent danger thereof in one or more States of the Confederation, the Diet might interfere to suppress such insurrection or rebellion, as threatening the general safety of the Confederation. And it might in like manner interfere on the application of any one State; or, if the local government was prevented by the insurgents from making such application, upon the notoriety of the fact of the existence of such insurrection, or imminent danger thereof, to suppress the same by the common force of the Confederation (*z*).

In case of the denial or unreasonable delay of justice by any State to its subjects, or others, the aggrieved party might invoke the mediation of the Diet; and if the suit between private individuals involved a question respecting the conflicting rights and obligations of different members of the union, and it could not be amicably arranged by compromise, the Diet might submit the controversy to the decision of an austrëgal tribunal (*a*).

The decrees of the Diet were executed by the local governments of the particular States of the Confederation, on application to them by the Diet for that purpose, excepting in those cases where the Diet interfered to suppress an insurrection or rebellion in one or more of the States; and even in these instances, the execution was to be enforced, so far as practicable, in concert with the local government against whose subjects it was directed (*b*).

The subjects of each member of the union had the right of acquiring and holding real property in any other State of the Confederation; of migrating from one State to another; of entering into the military or civil service of any one of the confederated States, subject to the paramount claim of their own native sovereign; and of exemption from every *droit de détraction*, or other similar tax, on removing their effects from one State to another, unless where particular reciprocal compacts had stipulated to the contrary. The Diet had power to establish uniform laws relating to the freedom of the press,

(*y*) Wiener Schluss-Acte, art. 60.
(*z*) Ibid. art. 25—28.
(*a*) Ibid. art. 29, 30.
(*b*) Ibid. art. 32.

and to secure to authors the copyright of their works throughout the Confederation (*c*).

The Diet had also power to regulate the commercial intercourse between the different States, and the free navigation of the rivers belonging to the Confederation, as secured by the treaty of Vienna (*d*).

The different Christian sects throughout the Confederation were entitled to an equality of civil and political rights; and the Diet was empowered to take into consideration the means of ameliorating the civil condition of the Jews, and of securing to them in all the States of the Confederation the full enjoyment of civil rights, upon condition that they submitted themselves to all the obligations of other citizens. In the meantime, the privileges granted to them by any particular State were to be maintained (*e*).

§ 48. Of the internal sovereignty of the States of the Germanic Confederation.

Notwithstanding the great mass of powers thus given to the Diet, and the numerous restraints imposed upon the exercise of internal sovereignty, by the individual States of which the union was composed, it does not appear that the Germanic Confederation could be distinguished in this respect from an ordinary equal alliance between independent sovereigns, except by its permanence, and by the greater number and complication of the objects it was intended to embrace. In respect to their internal sovereignty, the several States of the Confederation did not form, by their union, one compositive State, nor were they subject to a common sovereign. Though what were called the fundamental *laws* of the Confederation were framed by the Diet, which had also power to make organic regulations respecting its federal relations; these regulations were not, in general, enforced as laws directly binding on the private individual subjects, but only through the agency of each separate government adopting them, and giving them the force of laws within its own local jurisdiction. If there were cases where the Diet might rightfully enforce its own resolutions directly against the individual subjects, or the body of subjects within any particular State of the Confederation, without the agency of the local

(*c*) Bundes-Acte, art. 18
(*d*) Ibid. art. 19. Acte final, art. 108 - 117.
(*e*) Bundes-Acte art. 16.

governments, (and there appear to have been some such cases,) then those cases, when they occurred, formed an exception to the general character of the union, which then so far became a compositive State, or supreme federal government. All the members of the Confederation, as such, were equal in rights; and the occasional obedience of the Diet, and through it of the several States, to the commands of the two great preponderating members of the Confederation, Austria and Prussia, or even the habitual influence exercised by them over its councils, and over the councils of its several States, did not, in legal contemplation, impair their internal sovereignty, or change the legal character of their union.

§ 49. Of the external sovereignty of these States.

In respect to the exercise by the confederated States of their external sovereignty, we have already seen that the power of contracting alliances with other States, foreign to the Confederation, was expressly reserved to all the confederated States, with the proviso that such alliances were not directed against the security of the Confederation itself, or that of the several States of which it was composed. Each State also retained its rights of legation, both with respect to foreign powers and to its co-States (*f*). Although the diplomatic relations of the Confederation with the five great European Powers, parties to the Final Act of the Congress of Vienna, 1815, were habitually maintained by permanent legations from those powers to the Diet at Frankfort, yet the Confederation itself was not habitually represented by public ministers at the courts of these, or any other foreign powers; whilst each confederated State habitually sent to, and received such minister from other sovereign States, both within and without the Confederation. It was only on extraordinary occasions, such, for example, as the case of a negotiation for the conclusion of a peace or armistice, that the Diet appointed plenipotentiaries to treat with foreign powers (*g*).

According to the original plan of confederation as proposed by Austria and Prussia, those States, *not having possessions out of Germany*, were to have been absolutely prohibited from making alliances or war with any power foreign to the Confederation, without the consent of the latter. But this proposition

(*f*) Klüber, Offentliches Recht des Deutschen Bundes, §§ 461, 463.
(*g*) Klüber, § 148, § 152 a. Wiener Schluss-Acte, § 49.

was subsequently modified by the insertion of the above 63rd article of the Federal Act of 1815. And the limitations contained in that article upon the war-making and treaty-making powers, both of the Confederation itself and of its several members, were more completely defined by the Final Act of 1820 (*h*).

It resulted clearly from these provisions, that such of the confederated States, *as had possessions without the limits of the Confederation*, retained the authority of declaring and carrying on war against any power foreign to the Confederation, independently of the Confederation itself, which remained neutral in such a war, unless the Diet should recognize the existence of a danger threatening the federal territory. The sovereign members of the Confederation, having possessions without the limits thereof, were the Emperor of Austria, the King of Prussia, the King of the Netherlands, and the King of Denmark. Whenever, therefore, any one of those sovereigns undertook a war in his character of a European power, the Confederation, whose relations and obligations were unaffected by such war, remained a stranger thereto; in other words, it remained neutral, even if the war was defensive on the part of the confederated sovereign as to his possessions without the Confederation, unless the Diet recognized the existence of a danger threatening the federal territory (*i*).

It seems, also, to result from these provisions, taken in connection with the above-mentioned modification in the original plan of Confederation, that even those States *not having possessions without the limits of the Confederation*, retained the sovereign authority of separately declaring and carrying on war, and of negotiating and making peace with any power foreign to the Confederation, excepting in the single case of a war declared by the Confederation itself; in which case, no State could negotiate with the enemy, nor conclude peace or an armistice, without the consent of the rest.

In other cases of disputes, arising between any State of the Confederation and foreign powers, and the former asked the intervention of the Diet, the Confederation might interfere as an ally, or as a mediator; might examine the respective com-

(*h*) Wheaton's Hist. Law of Nations, pp. 447, 448, 457—460.
(*i*) Wiener Schluss-Acte, art. 46, 47. Kluber, Offentliches Recht des Deutschen Bundes, § 152 f.

plaints and pretensions of the contending parties. If the result of the investigation was, that the co-State was not in the right, the Diet would make the most serious representations to induce it to renounce its pretensions, would refuse its interference, and, in case of necessity, would take all proper means for the preservation of peace. If, on the contrary, the preliminary examination proved that the confederated State was in the right, the Diet would employ its good offices to obtain for it complete satisfaction and security (*k*).

The Germanic Confederation is a system of confederated States.

It follows, that not only the internal but the external sovereignty of the several States composing the Germanic Confederation, remained unimpaired, except so far as it might be affected by the express provisions of the fundamental laws authorising the federal body to represent their external sovereignty. In other respects, the several confederated States remained independent of each other, and of all States foreign to the Confederation. Their union constituted what the German public jurists call a *Staatenbund*, as contradistinguished from a *Bundesstaat;* that is to say, a supreme Federal Government (*l*).

§ 50. Act of the Diet of 1832.

Very important modifications were introduced into the Germanic Constitution, by an act of the Diet of the 28th of

(*k*) Wiener Schluss-Acte, art. 35—49. Kluber, § 462.

(*l*) Klüber, §§ 103a, 176, 248, 460, 461, 462. Heffter, das Europäische Völkerrecht, § 21.

The Treaty of Paris, 1814, art. 6, declares: "Les états de l'Allemagne seront indépendans et unis par un lien fédératif."

The Final Act of the Congress of Vienna, 1815, art. 54, declares:—"Le but de cette Confédération est le maintien de la sûreté extérieure et intérieure de l'Allemagne, de l'indépendance et de l'inviolabilité de ses états confédérés."

And the *Schluss-Acte*, of 1820, declares:—

"Art 1. Der deutsche Bund ist ein volkerrechtlicher Verein der deutschen souverainen Fursten und freien Stadte, zur Bewahrung der Unabhangigkeit und Unverletzbarkeit ihrer im Bunde begriffenen Staaten, und zur Erhaltung der innern und äussern Sicherheit Deutschlands.

"Art. 2. Dieser Verein besteht in seinen Innern als eine Gemeinschaft selbstandiger, unter sich unabhangiger Staaten, mit wechselseitigen gleichen Vertrags-Rechten und Vertrags-Obliegenheiten, in seinen aussern Verhaltnissen aber, als eine in politischer Einheit verbundene Gesammt-Macht."

TRANSLATION.

Article 1. The Germanic Confederation is an international union of the sovereign princes and Free Cities of Germany, formed for the maintenance of the independence and inviolability of the confederated States, as well as for the internal and external security of Germany.

Article 2. In respect to its internal relations, this Confederation forms a body of States independent between themselves, and bound to each other by rights and duties reciprocally stipulated. In respect to its external relations, it forms a collective power established on the principle of political union.

June, 1832. By the 1st article of this act it was declared, that, whereas, according to the 57th article of the Final Act of the Congress of Vienna, the powers of the State ought to remain in the hands of its chief, and the sovereign ought not to be bound by the local constitution to require the co-operation of the legislative Chambers, except as to the exercise of certain specified rights; the sovereigns of Germany, as members of the Confederation, have not only the right of rejecting the petitions of the Chambers, contrary to this principle, but the object of the Confederation makes it their duty to reject such petitions.

Art. 2. Since according to the spirit of the said 57th article of the Final Act, and its inductions, as expressed in the 58th article, the Chambers cannot refuse to any German sovereign the necessary means of fulfilling his federal obligations, and those imposed by the local constitution; the cases in which the Chambers endeavour to make their consent to the taxes necessary for these purposes depend upon the assent of the sovereign to their propositions upon any other subject, are to be classed among those cases to which are to be applied the 25th and 26th articles of the Final Act, relating to resistance of the subjects against the government.

Art. 3. The interior legislation of the States belonging to the Germanic Confederation, cannot prejudice the objects of the Confederation, as expressed in the 2nd article of the original act of confederation, and in the 1st article of the Final Act; nor can this legislation obstruct in any manner the accomplishment of the federal obligations of the State, and especially the payment of the taxes necessary to fulfil them.

Art. 4. In order to maintain the rights and dignity of the Confederation, and of the assembly representing it, against usurpations of every kind, and, at the same time, to facilitate to the States which are members of the Confederation the maintenance of the constitutional relations between the local governments and the legislative Chambers, there shall be appointed by the Diet, in the first instance, for the term of six years, a commission charged with the supervision of the deliberations of the Chambers, and with directing their attention to the propositions and resolutions which may be found

in opposition to the federal obligations, or to the rights of sovereignty, guaranteed by the compacts of the Confederation. This commission is to report to the Diet, which, if it finds the matter proper for further consideration, will put itself in relation with the local government concerned. After the lapse of six years, a new arrangement is to be made for the prolongation of the commission.

Art. 5. Since according to the 59th article of the Final Act, in those States where the publication of the deliberations of the Chambers is secured by the constitution, the free expression of opinion, either in the deliberations themselves, or in their publication through the medium of the press, cannot be so extended as to endanger the tranquillity of the State itself, or of the Confederation in general, all the governments belonging to it mutually bind themselves, as they are already bound by their federal relations, to adopt and maintain such measures as may be necessary to prevent and punish every attack against the Confederation in the local Chambers.

Art. 6. Since the Diet is already authorized by the 17th article of the Final Act, for the maintenance of the true meaning of the original act of confederation, to give its provisions such an interpretation as may be consistent with its object, in case doubts should arise in this respect, it is understood that the Confederation has the exclusive right of interpreting, so as to produce their legal effect, the original act of the Confederation and the Final Act, which right it exercises by its constitutional organ, the Diet (*m*).

§ 51. Act of the Diet of 1834.

Further modifications of the federal constitution were introduced by the act of the Diet of the 30th of October, 1834, in consequence of the diplomatic conferences held at Vienna in the same year, by the representatives of the different States of Germany.

By the 1st article of this last-mentioned act, it was provided that, in case of differences arising between the government of any State and the legislative Chambers, either respecting the interpretation of the local constitution, or upon the limits of the co-operation allowed to the Chambers, in carrying into effect certain determinate rights of the sovereign, and especially in case of the refusal of the necessary supplies for the

(*m*) Wheaton, Hist. Law of Nations, pp. 460—486.

support of government, conformably to the constitution and the federal obligations of the State, after every legal and constitutional means of conciliation have been exhausted, the differences shall be decided by a federal tribunal of arbitrators, appointed in the following manner :—

2. The representatives, each holding one of the seventeen votes in the ordinary assembly of the Diet, shall nominate, once in every three years, within the States represented by them, two persons distinguished by their reputation and length of service in the judicial and administrative service. The vacancies which may occur, during the said term of three years, in the tribunal of arbitrators thus constituted, shall be in like manner supplied as often as they may occur.

3. Whenever the case mentioned in the first article arises, and it becomes necessary to resort to a decision by this tribunal, there shall be chosen from among the thirty-four, six judges arbitrators, of whom three are to be selected by the government, and three by the Chambers. This number may be reduced to two, or increased to eight, by the consent of the parties; and in case of the neglect of either to name judges they may be appointed by the Diet.

4. The arbitrators thus designated shall elect an additional arbiter as an umpire, and in case of an equal division of votes, the umpire shall be appointed by the Diet.

5. The documents respecting the matter in dispute shall be transmitted to the umpire, by whom they shall be referred to two of the judges arbitrators to report upon the same, the one to be selected from among those chosen by the government, the other from among those chosen by the Chambers.

6. The judges arbitrators, including the umpire, shall then meet at a place designated by the parties, or, in case of disagreement, by the Diet, and decide by a majority of voices the matter in controversy according to their conscientious conviction.

7. In case they require further elucidations before proceeding to a decision, they shall apply to the Diet, by whom the same shall be furnished.

8. Unless in case of unavoidable delay under the circumstances stated in the preceding article, the decision shall be pronounced within the space of four months at farthest from

the nomination of the umpire, and be transmitted to the Diet, in order to be communicated to the government of the State interested.

9. The sentence of the judges arbitrators shall have the effect of an austrëgal judgment, and shall be carried into execution in the manner prescribed by the ordinances of the Confederation.

In the case of disputes more particularly relating to the financial budget, the effect of the arbitration extends to the period of time for which the same may have been voted.

10. The costs and expenses of the arbitration are to be exclusively borne by the State interested, and, in case of disputes respecting their payment, they shall be levied by a decree of the Diet.

11. The same tribunal shall decide upon the differences and disputes which may arise, in the free towns of the Confederation, between the Senate and the authorities established by the burghers in virtue of their local constitutions.

12. The different members of the confederation may resort to the same tribunal of arbitration to determine the controversies arising between them; and whenever the consent of the States respectively interested is given for that purpose, the Diet shall take the necessary measures to organize the tribunal according to the preceding articles (*n*).

§ 51a. German unity.

The growing power of the Germanic Confederation, and the desire of establishing German unity, gave rise to the project of creating an empire that should embrace the whole German race. In 1848, a congress assembled at Frankfort for the purpose of discussing this scheme, but nothing was then effected. Since that date the idea has been frequently revived, but the rivalry of Austria and Prussia, and the ambition and jealousy of the minor States long prevented its being carried out.

North German Confederation.

The war of 1864 entered into by Austria and Prussia against Denmark, tended materially to promote German unity; and the subsequent war of 1866, between Austria and Prussia, resulted in the dissolution of the Germanic Confederation, and the establishment of the North German Confederation. Austria was thereby excluded from participating in the affairs of Germany (*o*), and Prussia placed at the head of a national movement. This Confederation consists of the kingdoms of Prussia and Saxony, the Grand Duchies of Mecklenburg-Schwerin, Mecklenburg-Strelitz, Oldenburg, and Saxe Weimar, the Duchies of Anhalt, Saxe-Meiningen,

(*n*) For further details respecting the Germanic Constitution, see Wheaton's History of the Law of Nations, p. 455, *et seq.*

(*o*) [Hertslet, Map of Europe by Treaty, vol. iii. p. 1699].

Saxe-Coburg, and Saxe-Altenburg, some smaller States, and the free cities of Hamburg, Bremen, and Lubeck (*p*). These States agreed to enter into a perpetual confederation for the defence of the Federal territory, and of the rights prevailing therein, as well as for fostering the welfare of the German people.

§ 51b. The German Empire since the war with France.

After the war of 1870–71 with France, the idea of unity received its fullest development. The kingdoms of Bavaria and Wurtemburg, and the Grand Duchies of Baden and Hesse, were united to the North German Confederation, and the whole received the name of the German Empire (*q*). Within this Confederate territory the empire exercises the right of legislation according to the tenor of the Constitution, and with the effect that the imperial laws take precedence of the laws of the States (*r*). Legislation is carried on by a Council of the Confederation, and an Imperial Diet (*s*). The Council consists of the representatives of the members of the Confederation, amongst whom the votes are divided in such manner that Prussia has, with the former votes of Hanover, Electoral Hesse, Holstein, Nassau and Frankfort, seventeen votes, Bavaria six, Saxony four, Wurtemburg four, Baden three, Hesse three, Mecklenburg-Schwerin two, Brunswick two, and seventeen smaller States, one each (*t*). The totality of such votes can only be given in one sense, and there are fifty-eight votes in all.

The Presidency of the Confederation belongs to the King of Prussia, who bears the name of German Emperor, and who represents the empire internationally, declares war, makes peace, enters into treaties, and receives ambassadors. The consent of the Council is necessary for declaring war, unless the territory of the empire is actually attacked (*u*). The Imperial Diet is elected by universal and direct election (*x*), and its proceedings are public (*y*). The army and navy of the whole Empire are single forces under the command of the Emperor (*z*).

Thus, Germany has now become a *compositive* State, and the independence of its various members is merged in the sovereignty of the empire.

§ 51c. The Zollverein.

One of the drawbacks to the Germanic Confederation of 1815 was the preservation by each State of its own custom-houses and imposts. This was found to interfere so materially with the development of trade, that the Diet endeavoured to frame some legislative scheme for regulating the whole customs duties of the union, and for abolishing internal custom-houses within its territories. The Diet failed in its attempt, but the idea was gradually carried out by independent action on the part of several of the States. In 1827, Bavaria and Wurtemburg signed a treaty suppressing the custom-houses between themselves, adopting a uniform tariff of duties, and dividing the receipts proportionally (*a*). This was

(*p*) [State Papers, vol. lvii. p. 296. Hertslet, Map of Europe by Treaty, vol. iii. p. 1807].
(*q*) [Hertslet, Map of Europe, vol. iii. p. 1930].
(*r*) [Art. ii. of the Constitution of the German Empire].
(*s*) [Art. v.]. (*t*) [Art. vi.]. (*u*) [Art. xi.].
(*x*) [Art. xx.]. (*y*) [Art. xxii.]. (*z*) [Arts. liii. and lxiii.].
(*a*) [Marten's Nouveau Receuil, vol. vii. p. 167. State Papers, vol. xiv. p. 803].

the first treaty of the kind, and was soon followed by two others with the same object, one by Prussia with Anhalt and Hesse Darmstadt, another by Saxony with Hesse-Cassel, Brunswick, Nassau, and some smaller States.

The customs association to which Prussia belonged was called the *Zollverein*, and by the year 1855, the exertions of that State had absorbed into this league the whole of Germany, except Austria, the two Mecklenburg Duchies, Holstein, and the Hanse Towns (*b*). In 1867, the Zollverein was re-constituted by a treaty which came into force on the 1st of January, 1868, and was to continue till the 31st of December, 1877. In 1868, the Mecklenburg Duchies and Lubeck joined the league, which, as Austria had then been excluded from the affairs of Germany, embraced all the German Empire except the free towns of Hamburg and Bremen. The constitution of the German Empire of 1871 expressly keeps in force the treaty of July, 1867, and confirms the right of Hamburg and Bremen to remain as free ports outside the customs frontier, until they shall apply to be admitted therein (*c*).

§ 52. United States of America.

The constitution of the United States of America is of a very different nature from that of the Germanic confederation. It is not merely a league of sovereign states for their common defence against external and internal violence, but a supreme federal government, or composite State, acting not only upon the sovereign members of the union, but directly upon all its citizens in their individual and corporate capacities. It was established, as the constitutional act expressly declares, by "the people of the United States, in order to form a more perfect union, establish justice, ensure domestic tranquillity, provide for the common defence, promote the general welfare, and secure the blessings of liberty to them and their posterity." This constitution, and the laws made in pursuance thereof, and treaties made under the authority of the United States, are declared to be the supreme law of the land; and that the judges in every State shall be bound thereby, anything in the constitution or laws of any State to the contrary notwithstanding.

§ 53. Legislative power of the Union.

The legislative power of the Union is vested in a Congress, consisting of a Senate, the members of which are chosen by the local legislatures of the several States, and a House of Representatives, elected by the people in each State. This Congress has power to levy taxes and duties, to pay the debts, and provide for the common defence and general welfare of the Union; to borrow money on the credit of the United

(*b*) [Calvo, vol. i. § 63, p. 166].
(*c*) [Arts. xl. and xxxiv. See Hertslet, Map of Europe, vol. iii. pp. 1939, 1941. Statesman's Manual, 1877, Tit. Germany].

States; to regulate commerce with foreign nations, among the several States, and with the Indian tribes; to establish a uniform rule of naturalization, and uniform laws on the subject of bankruptcy throughout the Union; to coin money, and fix the standard of weights and measures; to establish post-offices and post-roads; to secure to authors and inventors the exclusive right to their writings and discoveries; to punish piracies and felonies on the high seas, and offences against the law of nations; to declare war, grant letters of marque and reprisal, and regulate captures by sea and land; to raise and support armies; to provide and maintain a navy; to make rules for the government of the land and naval forces; to exercise exclusive civil and criminal legislation over the district where the seat of the federal government is established, and over all forts, magazines, arsenals, and dock-yards belonging to the Union, and to make all laws necessary and proper to carry into execution all these and the other powers vested in the federal government by the Constitution.

§ 54. Executive power.

To give effect to this mass of sovereign authorities, the executive power is vested in a President of the United States, chosen by electors appointed in each State in such manner as the legislature thereof may direct. The judicial power extends to all cases in law and equity arising under the constitution, laws, and treaties of the Union, and is vested in a Supreme Court, and such inferior tribunals as Congress may establish. The federal judiciary exercises under this grant of power the authority to examine the laws passed by Congress and the several State legislatures, and, in cases proper for judicial determination, to decide on the constitutional validity of such laws. The judicial power also extends to all cases affecting ambassadors, other public ministers, and consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party; to controversies between two or more States; between a State and citizens of another State; between citizens of different States; between citizens of the same State claiming lands under grants of different States; and between a State, or the citizens thereof, and foreign States, citizens, or subjects.

§ 54a. Legislation in the

Mr. Dana considers the language of this clause likely to mislead foreign readers. He denies there being any tribunal which has special

United States.

and direct power to decide questions of constitutional law. The Supreme Court is the court of final resort, from whose decision there is no appeal; but, like all other courts, it only decides the questions of law that litigants bring before it. The American Constitution is a code of positive law; and is, moreover, the law having the highest authority in the Union. Acts of Congress do not correspond to English Acts of Parliament. The latter are supreme; and the only business of an English Court, when an Act comes before it, is to fix upon it the interpretation which the legislature is supposed to have intended. In America, a litigant may appeal to the Supreme Court against an Act of Congress, and the Court may declare whether the Act is constitutional or not. If the Court pronounces an Act to be unconstitutional, it remains on the statute book, but is inoperative, unless the Court at a subsequent time reverses its own decision (*d*).

Story, in his Commentary on the Constitution, says, "In measures exclusively of a political, legislative, or executive character, it is plain that, as the supreme authority as to these questions belongs to the legislative and executive departments, they cannot be re-examined elsewhere. But where the question is of a different nature, and capable of judicial inquiry and decision, there it admits of a very different consideration. It is in such cases that there is a final and common arbiter provided by the Constitution itself, to whose decisions all others are subordinate; and that arbiter is the supreme judicial authority of the Courts of the Union. No mode is provided by which any superior tribunal can re-examine what the Supreme Court has itself decided" (*e*).

In 1866, an application was made to the Supreme Court to restrain the President from carrying into effect an Act of Congress alleged to be unconstitutional; but the Court decided that such a proceeding was not within their jurisdiction (*f*).

§ 55. Treaty-making power.

The treaty-making power is vested exclusively in the President and Senate; all treaties negotiated with foreign States being subject to their ratification. No State of the Union can enter into any treaty, alliance, or confederation; grant letters of marque and reprisal; coin money; emit bills of credit; make any thing but gold and silver coin a tender in the payment of debts; pass any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts; grant any title of nobility; lay any duties on imports or exports, except such as are necessary to execute its local inspection laws, the produce of which must be paid into the national treasury; and such laws are subject to the revision and control of Congress. Nor can any State, without the consent of Congress,

(*d*) [Wheaton, by Dana, note 31, p. 79].

(*e*) [Story on the Constitution of the United States, vol. i. p. 266 (4th ed.)].

(*f*) [*State of Mississippi* v. *Johnson*, 4 Wallace, 475].

lay any tonnage duty; keep troops or ships of war in time of peace; enter into any agreement or compact with another State or with a foreign power; or engage in war unless actually invaded, or in such imminent danger as does not admit of delay. The Union guarantees to every State a republican form of government, and engages to protect each of them against invasion, and, on application of the legislature, or of the executive, when the legislature cannot be convened, against domestic violence.

§ 56. The American Union is a supreme federal government.

It is not within the province of this work to determine how far the internal sovereignty of the respective States composing the Union is impaired or modified by these constitutional provisions. But since all those powers, by which the international relations of these States are maintained with foreign States, in peace and in war, are expressly conferred by the constitution on the federal government, whilst the exercise of these powers by the several States is expressly prohibited, it is evident that the external sovereignty of the nation is exclusively vested in the Union. The independence of the respective States, in this respect, is merged in the sovereignty of the federal government, which thus becomes what the German public jurists call a *Bundesstaat.*

§ 57. Swiss Confederation.

The Swiss Confederation, as remodelled by the federal pact of 1815, consists of a union between the then twenty-two Cantons of Switzerland; the object of which is declared to be the preservation of their freedom, independence, and security against foreign attack, and of domestic order and tranquillity. The several Cantons guarantee to each other their respective constitutions and territorial possessions. The Confederation has a common army and treasury, supported by levies of men and contributions of money, in certain fixed proportions, among the different Cantons. In addition to these contributions, the military expenses of the Confederation are defrayed by duties on the importation of foreign merchandise, collected by the frontier Cantons, according to the tariff established by the Diet, and paid into the common treasury. The Diet consists of one deputy from every Canton, each having one vote, and assembles every year, alternately, at Berne, Zurich, and Lucerne, which are called the directing Cantons (*vorort*). The Diet has the exclusive power of declaring war,

and concluding treaties of peace, alliance, and commerce, with foreign States. A majority of three-fourths of the votes is essential to the validity of these acts; for all other purposes, a majority is sufficient. Each Canton may conclude separate military capitulations and treaties, relating to economical matters and objects of police, with foreign powers; provided they do not contravene the federal pact, nor the constitutional rights of the other Cantons. The Diet provides for the internal and external security of the Confederation; directs the operations, and appoints the commanders of the federal army, and names the ministers deputed to other foreign States. The direction of affairs, when the Diet is not in session, is confided to the directing Canton (*vorort*), which is empowered to act during the recess. The character of directing Canton alternates every two years, between Zurich, Berne, and Lucerne. The Diet may delegate to the directing Canton, or *vorort*, special full powers, under extraordinary circumstances, to be exercised when the Diet is not in session; adding, when it thinks fit, federal representatives, to assist the *vorort* in the direction of the affairs of the Confederation. In case of internal or external danger, each Canton has a right to require the aid of the other Cantons; in which case, notice is to be immediately given to the *vorort*, in order that the Diet may be assembled, to provide the necessary measures of security (*g*).

§ 58. Constitution of the Swiss Confederation compared with those of the Germanic Confederation and of the United States.

The compact, by which the sovereign Cantons of Switzerland are thus united, forms a federal body, which, in some respects, resembles the Germanic Confederation, whilst in others it more nearly approximates to the American Constitution. Each Canton retains its original sovereignty unimpaired, for all domestic purposes, even more completely than the German States; but the power of making war, and of concluding treaties of peace, alliance, and commerce, with foreign States, being exclusively vested in the federal Diet, all the foreign relations of the country necessarily fall under the cognizance of that body. In this respect, the present Swiss Confederation differs materially from that which existed before the French Revolution of 1789, which was, in effect, a mere treaty of alliance for the common defence against external hostility, but which did not prevent the several Cantons from

(*g*) Marten's Nouveau Recueil, tom. viii. p. 173.

making separate treaties with each other, and with foreign powers (*h*).

§ 59. Abortive attempts, since 1830, to change the federal pact of 1815.

Since the French Revolution of 1830, various changes have taken place in the local constitutions of the different Cantons, tending to give them a more democratic character; and several attempts have been made to revise the federal pact, so as to give it more of the character of a supreme federal government, or *Bundesstaat*, in respect to the internal relations of the Confederation. Those attempts have all proved abortive; and Switzerland still remains subject to the federal pact of 1815, except that three of the original Cantons,—Basle, Unterwalden, and Appenzel,—have been dismembered, so as to increase the whole number of Cantons to twenty-five. But as each division of these three original Cantons is entitled to half a vote only in the Diet, the total number of votes still remains twenty-two, as under the original federal pact (*i*).

§ 59a. Changes in the Swiss Constitution in 1848 and 1874.

In 1848, the Swiss Constitution was remodelled, but the essential principles of the pact of 1815 were maintained. The Cantons retained their sovereignty, except where it was limited by the constitution; they exercised all rights that were not conferred on the Federal Government. All political alliances between the Cantons were forbidden; but they were entitled to enter into conventions among themselves for regulating matters appertaining to legislation, the Administration of Justice, &c., subject to the approval of the Federal authority. The Federal Council represented the Cantons in their relation to foreign States. The rights of declaring war, of making peace, and of entering into treaties were vested, as before, exclusively in the Federal Government. The supreme authority of the Union was vested in a Federal assembly, consisting of two houses—a national council elected directly by the people, and a council of States composed of two deputies from each Canton. The Federal Council was composed of seven persons chosen from all the citizens eligible for the National Council, but no two members of it were to come from the same Canton. They retained their office for three years, and from among them a President was annually to be chosen. This body constituted the executive authority of the Confederation (*k*). In 1874 the Swiss Constitution was again revised, and some serious changes were made. The power of the Federal Government was greatly strengthened, and the maintenance and control of the army was conferred upon it (*l*). Switzerland has now ceased to be a system of confederated States (*Staatenbund*), and has become a *compositive* State (*Bundesstaat*) (*m*).

(*h*) Merlin, Répertoire, tit. *Ministre Public.*
(*i*) Wheaton, Hist. Law of Nations, pp. 491—496.
(*k*) [See Calvo, i. § 45].
(*l*) [Annual Reg. 1874, p. 288].
(*m*) [Statesman's Year-Book, 1877, Art. Switzerland].

PART SECOND.

ABSOLUTE INTERNATIONAL RIGHTS OF STATES.

CHAPTER I.

RIGHT OF SELF-PRESERVATION AND INDEPENDENCE.

§ 60. Rights of sovereign States, with respect to one another.

THE rights, which sovereign States enjoy with regard to one another, may be divided into rights of two sorts: *primitive*, or *absolute* rights; *conditional*, or *hypothetical* rights (*a*).

Every State has certain sovereign rights, to which it is entitled as an independent moral being; in other words, because it is a State. These rights are called the *absolute* international rights of States, because they are not limited to particular circumstances.

The rights to which sovereign States are entitled, under particular circumstances, in their relations with others, may be termed their *conditional* international rights; and they cease with the circumstances which gave rise to them. They are consequences of a quality of a sovereign State, but consequences which are not permanent, and which are only produced under particular circumstances. Thus war, for example, confers on belligerent or neutral States certain rights, which cease with the existence of the war.

§ 61. Right of self-preservation.

Of the *absolute* international rights of States, one of the most essential and important, and that which lies at the foundation of all the rest, is the right of self-preservation. It is not only a right with respect to other States, but a duty with respect to its own members, and the most solemn and important which the State owes to them. This right necessarily involves all other incidental rights, which are essential as means to give effect to the principal end.

(*a*) Klüber, Droit des Gens Moderne de l'Europe, § 36.

§ 62. Right of self defence modified by the equal rights of other States, or by treaty.

Among these is the right of self-defence. This again involves the right to require the military service of all its people, to levy troops and maintain a naval force, to build fortifications, and to impose and collect taxes for all these purposes. It is evident that the exercise of these absolute sovereign rights can be controlled only by the equal correspondent rights of other States, or by special compacts freely entered into with others, to modify the exercise of these rights.

In the exercise of these means of defence, no independent State can be restricted by any foreign power. But another nation may, by virtue of its own right of self-preservation, if it sees in these preparations an occasion for alarm, or if it anticipates any possible danger of aggression, demand explanations; and good faith, as well as sound policy, requires that these inquiries, when they are reasonable and made with good intentions, should be satisfactorily answered.

Thus, the absolute right to erect fortifications within the territory of the State has sometimes been modified by treaties, where the erection of such fortifications has been deemed to threaten the safety of other communities, or where such a concession has been extorted in the pride of victory, by a power strong enough to dictate the conditions of peace to its enemy. Thus, by the Treaty of Utrecht, between Great Britain and France, confirmed by that of Aix-la-Chapelle, in 1748, and of Paris, in 1763, the French government engaged to demolish the fortifications of Dunkirk. This stipulation, so humiliating to France, was effaced in the treaty of peace concluded between the two countries, in 1783, after the war of the American Revolution. By the treaty signed at Paris, in 1815, between the Allied Powers and France, it was stipulated that the fortifications of Huningen, within the French territory, which had been constantly a subject of uneasiness to the city of Basle, in the Helvetic Confederation, should be demolished, and should never be renewed or replaced by other fortifications, at a distance of not less than three leagues from the city of Basle (*b*).

§ 62a. Belgian fortresses.

After the separation of Belgium and Holland in 1830 the Powers agreed that as the neutrality of Belgium had been guaranteed, she ought

(*b*) Marten's Recueil des Traités, tom. ii. p. 469.

to change the system of military defence which had been adopted for the Kingdom of the Netherlands, and therefore a negotiation was set on foot for the purpose of selecting which of the Belgian fortresses should be demolished (c). In 1856 Russia agreed that the Aland Islands in the Baltic should not be fortified, and that no military or naval establishment should be maintained there (d). Russia and Turkey also agreed at the Peace of Paris, 1856, not to maintain any military-maritime arsenals on the coasts of the Black Sea, but this clause of the treaty was abrogated in 1871 (e).

The Aland Islands.

§ 63. Right of intervention or interference.

The right of every independent State to increase its national dominions, wealth, population, and power, by all innocent and lawful means; such as the pacific acquisition of new territory, the discovery and settlement of new countries, the extension of its navigation and fisheries, the improvement of its revenues, arts, agriculture, and commerce, the increase of its military and naval force; is an incontrovertible right of sovereignty, generally recognized by the usage and opinion of nations. It can be limited in its exercise only by the equal correspondent rights of other States, growing out of the same primeval right of self-preservation. Where the exercise of this right, by any of these means, directly affects the security of others,—as where it immediately interferes with the actual exercise of the sovereign rights of other States,—there is no difficulty in assigning its precise limits. But where it merely involves a supposed contingent danger to the safety of others, arising out of the undue aggrandisement of a particular State, or the disturbance of what has been called the balance of power, questions of the greatest difficulty arise, which belong rather to the science of politics than of public law.

The occasions on which the right of forcible interference has been exercised in order to prevent the undue aggrandisement of a particular State, by such innocent and lawful means as those above mentioned, are comparatively few, and cannot be justified in any case, except in that where an excessive augmentation of its military and naval forces may give just ground of alarm to its neighbours. The internal development of the resources of a country, or its acquisition of colonies and dependencies at a distance from Europe, has

(c) [Protocol of 17th April, 1831. See Hertslet, Map of Europe, vol. ii. p. 856].
(d) [See Ibid., vol. ii. p. 1272].
(e) [Art. xiii. See Ibid., vol. ii. p. 1256; vol. iii. p. 1920].

never been considered a just motive for such interference. It seems to be felt with respect to the latter, that distant colonies and dependencies generally weaken, and always render more vulnerable the metropolitan State. And with respect to the former, although the wealth and population of a country is the most effectual means by which its power can be augmented, such an augmentation is too gradual to excite alarm. To which it must be added that the injustice and mischief of admitting that nations have a right to use force for the express purpose of retarding the civilization and diminishing the prosperity of their inoffensive neighbours, are too revolting to allow such a right to be inserted in the international code. Interferences, therefore, to preserve the balance of power, have been generally confined to prevent a sovereign, already powerful, from incorporating conquered provinces into his territory, or increasing his dominions by marriage or inheritance, or exercising a dictatorial influence over the councils and conduct of other independent States (*f*).

§ 63a. Legal aspect of intervention.

Sir W. Harcourt says of intervention: "It is a high and summary procedure which may sometimes snatch a remedy beyond the reach of law. Nevertheless it must be admitted that in the case of intervention, as in that of revolution, its essence is illegality, and its justification is its success. Of all things at once the most unjustifiable and the most impolitic is an unsuccessful intervention" (*g*). Chateaubriand, in a celebrated speech in the French Chamber, asserted that "no government has a right to interfere in the affairs of another government, except in the case where the security and immediate interests of the first government are compromised" (*h*). It seems impossible to lay down any distinct rules with regard to intervention. As stated in the text, the subject belongs to politics rather than to public law. It cannot be distinctly stated what combination of circumstances menaces the security of any State, or tends to disturb the balance of power, and what does not. Statesmen must be guided by the knowledge they possess of the intentions of other countries, and by what they deem necessary for the security of their own, and in the present condition of Europe there seems little probability of any rules regarding intervention being attended to, even if they could be satisfactorily drawn up.

Each member of the great society of nations being entirely independent of every other, and living in what has been

(*f*) Senior, Edinb. Rev. No. 156, art. 1, p. 329.
(*g*) [Letters of Historicus, p. 41].
(*h*) [See Halleck, p. 86; Alison, Hist. of Europe, ch. 12, § 41; Moniteur, 15th Feb. 1823; Manning, Law of Nations, p. 98; Amari, Nouvel expose du principe de non-intervention; Revue de Droit Int. 1873, p. 352].

called a state of nature in respect to others, acknowledging no common sovereign, arbiter, or judge; the law which prevails between nations being deficient in those external sanctions by which the laws of civil society are enforced among individuals; and the performance of the duties of international law being compelled by moral sanctions only, by fear on the part of nations of provoking general hostility, and incurring its probable evils in case they should violate this law; an apprehension of the possible consequences of the undue aggrandisement of any one nation upon the independence and the safety of others, has induced the States of modern Europe to observe, with systematic vigilance, every material disturbance in the equilibrium of their respective forces. This preventive policy has been the pretext of the most bloody and destructive wars waged in modern times, some of which have certainly originated in well-founded apprehensions of peril to the independence of weaker States, but the greater part have been founded upon insufficient reasons, disguising the real motives by which princes and cabinets have been influenced. Wherever the spirit of encroachment has really threatened the general security, it has commonly broken out in such overt acts as not only plainly indicated the ambitious purpose, but also furnished substantive grounds in themselves sufficient to justify a resort to arms by other nations. Such were the grounds of the confederacies created, and the wars undertaken to check the aggrandisement of Spain and the house of Austria, under Charles V. and his successors;—an object finally accomplished by the treaty of Westphalia, which so long constituted the written public law of Europe. The long and violent struggle between the religious parties engendered by the Reformation in Germany, spread throughout Europe, and became closely connected with political interests and ambition. The great Catholic and Protestant powers mutually protected the adherents of their own faith in the bosom of rival States. The repeated interference of Austria and Spain in favour of the Catholic faction in France, Germany, and England, and of the Protestant powers to protect their persecuted brethren in Germany, France, and the Netherlands, gave a peculiar colouring to the political transactions of the age. This was still more heightened by

Wars of the Reformation.

the conduct of Catholic France under the ministry of Cardinal Richelieu, in sustaining, by a singular refinement of policy, the Protestant princes and people of Germany against the house of Austria, while she was persecuting with unrelenting severity her own subjects of the reformed faith. The balance of power adjusted by the peace of Westphalia was once more disturbed by the ambition of Louis XIV., which compelled the Protestant States of Europe to unite with the house of Austria against the encroachments of France herself, and induced the allies to patronise the English Revolution of 1688, whilst the French monarch interfered to support the pretensions of the Stuarts. These great transactions furnished numerous examples of interference by the European States in the affairs of each other, where the interest and security of the interfering powers were supposed to be seriously affected by the domestic transactions of other nations, which can hardly be referred to any fixed and definite principle or international law, or furnish a general rule fit to be observed in other apparently analogous cases (*i*).

§ 64. Wars of the French Revolution.

The same remarks will apply to the more recent, but not less important events growing out of the French Revolution. They furnish a strong admonition against attempting to reduce to a rule, and to incorporate into the code of nations, a principle so indefinite and so peculiarly liable to abuse, in its practical application. The successive coalitions formed by the great European monarchies against France subsequent to her first revolution of 1789, were avowedly designed to check the progress of her revolutionary principles and the extension of her military power. Such was the principle of intervention in the internal affairs of France, avowed by the Allied Courts, and by the publicists who sustained their cause. France, on her side, relying on the independence of nations, contended for non-intervention as a right. The efforts of these coalitions ultimately resulted in the formation of an alliance, intended to be permanent, between the four great powers of Russia, Austria, Prussia, and Great Britain, to which France subsequently acceded, at the Congress of Aix-la-Chapelle, in 1818, constituting a sort of superintending authority in these powers over the international affairs of

Alliance of the five great European powers.

(*i*) Wheaton, Hist. Law of Nations, Pt. I. §§ 2, 3, pp. 80—88.

Europe, the precise extent and objects of which were never very accurately defined. As interpreted by those of the contracting powers, who were also the original parties to the compact called the Holy Alliance, this union was intended to form a perpetual system of intervention among the European States, adapted to prevent any such change in the internal forms of their respective governments, as might endanger the existence of the monarchical institutions which had been re-established under the legitimate dynasties of their respective reigning houses. This general right of interference was sometimes defined so as to be applicable to every case of popular revolution, where the change in the form of government did not proceed from the voluntary concession of the reigning sovereign, or was not confirmed by his sanction, given under such circumstances as to remove all doubt of his having freely consented. At others, it was extended to every revolutionary movement pronounced by these powers to endanger, in its consequences, immediate or remote, the social order of Europe, or the particular safety of neighbouring States.

The events which followed the Congress of Aix-la-Chapelle prove the inefficacy of all the attempts that have been made to establish a general and invariable principle on the subject of intervention. It is, in fact, impossible to lay down an absolute rule on this subject; and every rule that wants that quality must necessarily be vague, and subject to the abuses to which human passions will give rise, in its practical application.

§ 64a. The balance of power.

The theory of the balance of power in Europe has no doubt given rise to many wars, and been made the pretext for much unjust aggression and interference, but its influence has not been an unmixed evil. It has of late been much criticised, and one eminent statesman has gone so far as to denounce it as "that tradition which has been the pest of Europe" (*k*). The European Commonwealth consists of a number of independent States, all equal in the eye of international law, but not in reality equal in strength. Unhappily some of these States are at times seized with the desire of appropriating to themselves the territories of their neighbours, especially when their neighbours are weak; and it is often necessary, in order to prevent the utter extinction of the weaker

(*k*) [Mr. Lowe's speech at Croydon, *Times*, Sept. 13, 1876].

States, that there should be some force to restrain this tendency, stronger than that of the State actually attacked. This force is brought into existence by the theory of the balance of power; and had it not been a reality, most of the smaller countries of Europe would probably have been by this time swallowed up by the great Powers. A denial of the necessity of any balance of power must admit that there is no danger to the whole Commonwealth, when the strength of any one State becomes much greater than that of any of the others; that such a condition of things does not endanger the general liberty; and that the affairs of its neighbours are of no moment to any State, unless its own territory or immediate interests are threatened. The admission of its necessity implies that it is the duty of the members of the European Commonwealth to act together, and not independently in their mutual relations. It does not mean that all European States are to combine to maintain the actual *status quo*, and that no territorial changes or differences in the relative strength of nations are to be allowed. It does mean that States are to keep a watchful eye on each other, and it does mean that when a very great increase of power is coupled with an ambitious and aggressive policy in any one State, the others should combine and take such measures as will curb and restrain the dangerous member. And until human nature is changed, and aggrandisement and the extension of territory and influence cease to be the objects of desire, it is hard to see how Europe can dispense with a balance of power (*l*). That the principle is still recognized is evident from recent events in the East of Europe. The occupation of Bosnia and Herzegovina by Austria, in spite of the reasons given for it, was undertaken only to counteract the preponderating influence of Russia in Turkey in Europe. The occupation of Cyprus and the British protectorate over Asia Minor, were entered into avowedly to prevent the same Power from annexing any part of those territories. And it was the declared object of the whole Treaty of Berlin so to consolidate and strengthen what was left of the Turkish Empire, that it should still remain a State powerful enough to maintain, as far as possible, the balance that had till then existed.

§ 65. Congress of Troppau and of Laybach.

The measures adopted by Austria, Russia, and Prussia, at the Congress of Troppau and Laybach, in respect to the Neapolitan Revolution of 1820, were founded upon principles adapted to give the great powers of the European continent a perpetual pretext for interfering in the internal concerns of its different States. The British government expressly dissented from these principles, not only upon the ground of their being, if reciprocally acted on, contrary to the fundamental laws of Great Britain, but such as could not safely be admitted as

(*l*) [See *Quarterly Review*, No. 286, April, 1877. Bluntschli, Le Droit International Codifié (Paris, 1870), p. 95; Pradier Fodéré; Principes Généraux du Droit, &c.]

part of a system of international law. In the circular despatch, addressed on this occasion to all its diplomatic agents, it was stated that, though no government could be more prepared than the British government was to uphold the right of any State or States to interfere, where their own immediate security or essential interests are seriously endangered by the internal transactions of another State, it regarded the assumption of such a right as only to be justified by the strongest necessity, and to be limited and regulated thereby; and did not admit that it could receive a general and indiscriminate application to all revolutionary movements, without reference to their immediate bearing upon some particular State or States, or that it could be made, prospectively, the basis of an alliance. The British government regarded its exercise as an exception to general principles of the greatest value and importance, and as one that only properly grows out of the special circumstances of the case; but it at the same time considered, that exceptions of this description never can, without the utmost danger, be so far reduced to rule, as to be incorporated into the ordinary diplomacy of States, or into the institutes of the Law of Nations (*n*).

§ 66. Congress of Verona.

The British government also declined being a party to the proceedings of the Congress held at Verona, in 1822, which ultimately led to an armed interference by France, under the sanction of Austria, Russia, and Prussia, in the internal affairs of Spain, and the overthrow of the Spanish Constitution of the Cortes. The British government disclaimed for itself, and denied to other powers, the right of requiring any changes in the internal institutions of independent States, with the menace of hostile attack in case of refusal. It did not consider the Spanish Revolution as affording a case of that direct and imminent danger to the safety and interests of other States, which might justify a forcible interference. The original alliance between Great Britain and the other principal European powers, was specifically designed for the re-conquest and liberation of the European continent from the military dominion of France; and having subverted that dominion, it took the state of possession, as established by

(*n*) Lord Castlereagh's Circular Despatch, Jan. 19, 1821. Annual Register, vol. lxii. Part II. p. 737.

the peace, under the joint protection of the alliance. It never was, however, intended as an union for the government of the world, or for the superintendence of the internal affairs of other States. No proof had been produced to the British government of any design, on the part of Spain, to invade the territory of France; of any attempt to introduce disaffection among her soldiery; or of any project to undermine her political institutions; and, so long as the struggles and disturbances of Spain should be confined within the circle of her own territory, they could not be admitted by the British government to afford any plea for foreign interference. If the end of the last and the beginning of the present century saw all Europe combined against France, it was not on account of the internal changes which France thought necessary for her own political and civil reformation; but because she attempted to propagate, first, her principles, and afterwards her dominion, by the sword (*o*).

§ 67. War between Spain and her American colonies.

Both Great Britain and the United States, on the same occasion, protested against the right of the Allied Powers to interfere, by forcible means, in the contest between Spain and her revolted American Colonies. The British government declared its determination to remain strictly neutral, should the war be unhappily prolonged; but that the junction of any foreign power, in an enterprise of Spain against the colonies, would be viewed by it as constituting an entirely new question, and one upon which it must take such decision as the interests of Great Britain might require. That it could not enter into any stipulation, binding itself either to refuse or delay its recognition of the independence of the colonies, nor wait indefinitely for an accommodation between Spain and the colonies; and that it would consider any foreign interference, by force or by menace, in the dispute between them, as a motive for recognizing the latter without delay (*p*).

The United States government declared that it should con-

(*o*) Confidential Minute of Lord Castlereagh on the Affairs of Spain, communicated to the Allied Courts in May, 1822. Annual Register, vol. lxv.; *Public Documents*, p. 94. Mr. Secretary Canning's Letter to Sir C. Stuart, 28th Jan. 1823, p. 114. Same to the Same, 31st March, 1823, p. 141.

(*p*) Memorandum of Conference between Mr. Secretary Canning and Prince Polignac, 9th October, 1823. Annual Register, vol. lxvi. p. 99. *Public Documents.*

sider any attempt, on the part of the allied European powers, to extend their peculiar political system to the American continent, as dangerous to the peace and safety of the United States. With the existing colonies or dependencies of any European power they had not interfered, and should not interfere; but with respect to the governments, whose independence they had recognized, they could not view any interposition for the purpose of oppressing them, or controlling in any other manner their destiny, in any other light than as a manifestation of an unfriendly disposition towards the United States. They had declared their neutrality in the war between Spain and those new governments, at the time of their recognition; and to this neutrality they should continue to adhere, provided no change should occur, which, in their judgment, should make a correspondent change, on the part of the United States, indispensable to their own security. The late events in Spain and Portugal showed that Europe was still unsettled. Of this important fact no stronger proof could be adduced than that the Allied Powers should have thought it proper, on any principle satisfactory to themselves, to have interposed by force in the internal concerns of Spain. To what extent such interpositions might be carried, on the same principle, was a question on which all independent powers, whose governments differed from theirs, were interested,—even those most remote,— and none more so than the United States.

The policy of the American government, in regard to Europe, adopted at an early stage of the war which had so long agitated that quarter of the globe, nevertheless remained the same. This policy was, not to interfere in the internal concerns of any of the European powers; to consider the government, *de facto*, as the legitimate government for them; to cultivate friendly relations with it, and to preserve those relations by a frank, firm, and manly policy; meeting, in all instances, the just claims of every power,—submitting to injuries from none. But, with regard to the American continents, circumstances were widely different. It was impossible that the Allied Powers should extend their political system to any portion of these continents, without endangering the peace and happiness of the United States. It

was therefore impossible that the latter should behold such interposition in any form with indifference (*q*).

§ 67a. The Monroe doctrine.

This policy of the United States has acquired the name of "the Monroe doctrine," from its having received its most explicit enunciation in President Monroe's seventh annual message to Congress in 1823. "In the wars of the European powers," said the President, "in matters relating to themselves we have never taken any part, nor does it comport with our policy to do so. It is only when our rights are invaded or seriously menaced, that we resent injuries or make preparations for our defence. With the movements in this hemisphere we are of necessity more intimately connected, and by causes which must be obvious to all enlightened and impartial observers. The political system of the allied powers is essentially different in this respect from that of America. This difference proceeds from that which exists in their respective governments. . . . . We owe it, therefore, to candour and to the amicable relations existing between the United States and those powers to declare that we should consider any attempt on their part to extend their system to any portion of this hemisphere, as dangerous to our peace and safety" (*r*). This political formula has been to a great extent acted upon by the United States, especially with regard to their taking no part in European politics. Nevertheless it still exists only as a "doctrine," and has not been incorporated into any legislative enactment or into any convention (*s*).

§ 68. British interference in the affairs of Portugal in 1826.

Great Britain had limited herself to protesting against the interference of the French government in the internal affairs of Spain, and had refrained from interposing by force, to prevent the invasion of the peninsula by France. The constitution of the Cortes was overturned, and Ferdinand VII. restored to absolute power. These events were followed by the death of John VI., King of Portugal, in 1825. The constitution of Brazil had provided that its crown should never be united on the same head with that of Portugal; and Dom Pedro resigned the latter to his infant daughter, Dona Maria, appointing a regency to govern the kingdom during her minority, and at the same time, granting a constitutional charter to the European dominions of the House of Braganza. The Spanish government, restored to the plenitude of its absolute authority, and dreading the example of the peaceable establishment of a constitutional government in a neighbouring

(*q*) President Monroe's Message to Congress, 2nd December, 1823. Annual Register, vol. lxv. *Public Documents*, p. 193.

(*r*) [President's Annual Message to Congress, 2nd Dec. 1823. See Statesman's Manual, vol. i. p. 556. Calvo, Droit International, vol. i. § 98].

(*s*) [Calvo, i. § 101].

kingdom, countenanced the pretensions of Dom Miguel to the Portuguese crown, and supported the efforts of his partisans to overthrow the regency and the charter. Hostile inroads into the territory of Portugal were concerted in Spain, and executed with the connivance of the Spanish authorities, by Portuguese troops, belonging to the party of the Pretender, who had deserted into Spain, and were received and succoured by the Spanish authorities on the frontiers. Under these circumstances, the British government received an application from the regency of Portugal, claiming, in virtue of the ancient treaties of alliance and friendship subsisting between the two crowns, the military aid of Great Britain against the hostile aggression of Spain. In acceding to that application, and sending a corps of British troops for the defence of Portugal, it was stated by the British minister that the Portuguese Constitution was admitted to have proceeded from a legitimate source, and it was recommended to Englishmen by the ready acceptance which it had met with from all orders of the Portuguese people. But it would not be for the British nation to force it on the people of Portugal, if they were unwilling to receive it; or if any schism should exist among the Portuguese themselves, as to its fitness and congeniality to the wants and wishes of the nation. They went to Portugal in the discharge of a sacred obligation, contracted under ancient and modern treaties. When there, nothing would be done by them to enforce the establishment of the constitution; but they must take care that nothing was done by others to prevent it from being fairly carried into effect. The hostile aggression of Spain, in countenancing and aiding the party opposed to the Portuguese Constitution, was in direct violation of repeated solemn assurances of the Spanish cabinet to the British government, engaging to abstain from such interference. The sole object of Great Britain was to obtain the faithful execution of those engagements. The former case of the invasion of Spain by France, having for its object to overturn the Spanish Constitution, was essentially different in its circumstances. France had given to Great Britain cause of war, by that aggression upon the independence of Spain. The British government might lawfully have interfered, on grounds of political expediency; but they were not bound to

interfere, as they were now bound to interfere on behalf of Portugal, by the obligations of treaty. War might have been their free choice, if they had deemed it politic, in the case of Spain; interference on behalf of Portugal was their duty, unless they were prepared to abandon the principles of national faith and national honour (*t*).

§ 69. Interference of the Christian powers of Europe, in favour of the Greeks.

The interference of the Christian powers of Europe, in favour of the Greeks, who, after enduring ages of cruel oppression, had shaken off the Ottoman yoke, affords a further illustration of the principles of international law authorizing such an interference, not only where the interests and safety of other powers are immediately affected by the internal transactions of a particular State, but where the general interests of humanity are infringed by the excesses of a barbarous and despotic government. These principles are fully recognized in the treaty for the pacification of Greece, concluded at London, on the 6th of July, 1827, between France, Great Britain, and Russia. The preamble of this treaty sets forth, that the three contracting parties were "penetrated with the necessity of putting an end to the sanguinary contest, which, by delivering up the Greek provinces and the isles of the Archipelago to all the disorders of anarchy, produces daily fresh impediments to the commerce of the European States, and gives occasion to piracies, which not only expose the subjects of the high contracting parties to considerable losses, but, besides, render necessary burdensome measures of protection and repression." It then states that the British and French governments, having received a pressing request from the Greeks to interpose their mediation with the Porte, and being, as well as the Emperor of Russia, animated by the desire of stopping the effusion of blood, and of arresting the evils of all kinds which might arise from the continuance of such a state of things, had resolved to unite their efforts, and to regulate the operations thereof by a formal treaty, with the view of re-establishing peace between the contending parties, by means of an arrangement, which was called for as much by humanity as by the interest of the repose of Europe. The treaty then provides, (art. 1,) that the three contracting powers should

(*t*) Mr. Canning's Speech in the House of Commons, 11th December, 1826. Annual Register, vol. lxviii. p. 192.

offer their mediation to the Porte, by a joint declaration of their ambassadors at Constantinople; and that there should be made, at the same time, to the two contending parties, the demand of an immediate armistice, as a preliminary condition indispensable to opening any negotiation. Article 2nd provides the terms of the arrangement to be made, as to the civil and political condition of Greece, in consequence of the principles of a previous understanding between Great Britain and Russia. By the 3rd article it was agreed, that the details of this arrangement, and the limits of the territory to be included under it, should be settled in a separate negotiation between the high contracting powers and the two contending parties. To this public treaty an additional and secret article was added, stipulating that the high contracting parties would take immediate measures for establishing commercial relations with the Greeks, by sending to them and receiving from them consular agents, so long as there should exist among them authorities capable of maintaining such relations. That if, within the term of one month, the Porte did not accept the proposed armistice, or if the Greeks refused to execute it, the high contracting parties should declare to that one of the two contending parties that should wish to continue hostilities, or to both, if it should become necessary, that the contracting powers intended to exert all the means, which circumstances might suggest to their prudence, to give immediate effect to the armistice, by preventing, as far as might be in their power, all collision between the contending parties. The secret article concluded by declaring, that if these measures did not suffice to induce the Ottoman Porte to adopt the propositions made by the high contracting powers, or if, on the other hand, the Greeks should renounce the conditions stipulated in their favour, the contracting parties would nevertheless continue to prosecute the work of pacification on the basis agreed upon between them; and, in consequence, they authorized, from that time forward, their representatives in London to discuss and determine the ulterior measures to which it might become necessary to resort.

The Greeks accepted the proffered mediation of the three powers, which the Turks rejected, and instructions were given to the commanders of the allied squadrons to compel the ces-

sation of hostilities. This was effected by the result of the battle of Navarino, with the occupation of the Morea by French troops; and the independence of the Greek State was ultimately recognized by the Ottoman Porte, under the mediation of the contracting powers. If, as some writers have supposed, the Turks belong to a family or set of nations which is not bound by the general international law of Christendom, they have still no right to complain of the measures which the Christian powers thought proper to adopt for the protection of their religious brethren, oppressed by the Mohammedan rule. In a ruder age, the nations of Europe, impelled by a generous and enthusiastic feeling of sympathy, inundated the plains of Asia to recover the Holy Sepulchre from the possession of infidels, and to deliver the Christian pilgrims from the merciless oppressions practised by the Saracens. The Protestant princes and States of Europe, during the sixteenth and seventeenth centuries, did not scruple to confederate and wage war, in order to secure the freedom of religious worship for the votaries of their faith in the bosom of Catholic communities, to whose subjects it was denied. Still more justifiable was the interference of the Christian powers of Europe to rescue a whole nation, not merely from religious persecution, but from the cruel alternative of being transported from their native land, or exterminated by their merciless oppressors. The rights of human nature wantonly outraged by this cruel warfare, prosecuted for six years against a civilized and Christian people, to whose ancestors mankind are so largely indebted for the blessings of arts and of letters, were but tardily and imperfectly vindicated by this measure. "Whatever," as Sir James Mackintosh said, "a nation may lawfully defend for itself, it may defend for another people, if called upon to interpose." The interference of the Christian powers, to put an end to this bloody contest might, therefore, have been safely rested upon this ground alone, without appealing to the interests of commerce and of the repose of Europe, which, as well as the interests of humanity, are alluded to in the treaty, as the determining motives of the high contracting parties (*u*).

(*u*) Another treaty was concluded at London, between the same three powers, on the 7th of May, 1832, by which the election of Prince Otho of Bavaria, as

§ 70. Interference of Austria, Gt. Britain, Prussia, and Russia, in the internal affairs of the Ottoman Empire, in 1840.

We have already seen, that the relations which have prevailed between the Ottoman Empire and the other European States have only recently brought the former within the pale of that public law by which the latter are governed, and which was originally founded on that community of manners, institutions, and religion, which distinguish the nations of Christendom from those of the Mohammedan world (*x*). Yet the integrity and independence of that empire have been considered essential to the general balance of power, ever since the crescent ceased to be an object of dread to the western nations of Europe. The above-mentioned interference of three of the great Christian powers in the affairs of Greece had been complicated, by the separate war between Russia and the Ottoman Empire, which was terminated by the Treaty of Adrianople, in 1829, followed by the treaty of alliance between the two empires, of Unkiar-Skelessi, in 1833. The *casus fœderis* of the latter treaty was brought on by the attempts of Mehemet Ali, Pasha of Egypt, to assert his independence, and of the Porte, which sought to recover its lost provinces. The *status quo*, which had been established between the Sultan and his vassal by the arrangement of Kutayah, in 1833, under the mediation of France and Great Britain, on which the peace of the Levant depended, and with it the peace of Europe was supposed to depend, was thus constantly threatened by the irreconcilable pretensions of the two great divisions of the Ottoman Empire. The war again broke out between them in 1839, and the Turkish army was overthrown in the decisive battle of Nezib, which was followed by the desertion of the fleet to Mehemet Ali, and by the death of Sultan Mahmoud II.

In this state of things, the western powers of Europe thought they perceived the necessity of interfering to save the Ottoman Empire from the double danger with which it was threatened; by the aggressions of the Pasha of Egypt on

King of Greece, was confirmed, and the sovereignty and independence of the new kingdom guaranteed by the contracting parties, according to the terms of the protocol signed by them on the 3rd of February, 1830, and accepted by Greece and the Ottoman Porte. [King Otho was expelled in 1862, and, after some difficulty in finding any one to fill his place, Prince George of Denmark mounted the Greek throne and took the title of King of the Hellenes in March, 1863. See Statesman's Year Book, 1877, tit. Greece].

(*x*) *Vide supra*, Part I. ch. i. § 13.

one side, and the exclusive protectorate of Russia on the other. A long and intricate negotiation ensued between the five great European powers, from the voluminous documents relating to which the following general principles may be collected, as having received the formal assent of all the parties to the negotiations, however divergent might be their respective views as to the application of those principles.

1. The right of the five great European powers to interfere in this contest was placed upon the ground of its threatening, in its consequences, the general balance of power and the peace of Europe. The only difference of opinion arose as to the means by which the desirable end of preventing all future conflict between the two contending parties could best be accomplished.

2. It was agreed that this interference could only take place on the formal application of the Sultan himself, according to the rule laid down by the Congress of Aix-la-Chapelle, in 1818, that the five great powers would never assume jurisdiction over questions concerning the rights and interests of another power, except at its request, and without inviting such power to take part in the conference.

3. The death of Sultan Mahmoud being imminent, and the dangers of the Ottoman Empire having increased by a complication of disasters, each of the five powers declared its determination to maintain the independence of that empire, under the reigning dynasty; and as a necessary consequence of this determination, that neither of them should seek to profit by the present state of things to obtain an increase of territory or an exclusive influence.

The negotiations finally resulted in the conclusion of the convention of the 15th July, 1840, between four of the great European powers, Austria, Great Britain, Prussia, and Russia, to which the Ottoman Porte acceded, and in consequence of which Mehemet Ali was compelled to relinquish the possession of all the provinces held by him, except Egypt, the hereditary Pachalic of which was confirmed to him, according to the conditions contained in the separate article of the convention (*y*).

(*y*) Wheaton, Hist. of the Law of Nations, pp. 563—583. [State Papers, vol. xxviii. p. 342].

§ 70a. The Eastern Question.

The Ottoman Empire has been an endless source of disturbance to the peace of Europe ever since this treaty of 1840. It occupies a peculiar and anomalous position, and all attempts to establish a permanent and satisfactory relation between this State and the other European Powers have as yet proved failures. Whether the Treaty of Berlin will solve the problem or not, is still an open question. The value and permanence of the settlement then effected can only be proved by time. The situation of the inhabitants of European Turkey is in many respects unfortunate. The majority are Christians belonging to various nationalities, and subjected to the dominant and Mohammedan race of the Turks, from whom they are alienated by differences not only of religion and race, but of language, manners, and customs. The Turks are not a civilizing people. They are a nation of soldiers, who care little for the peaceful pursuits of trade, literature, and science; while many of their subjects, especially the Greeks, are capable of attaining to the highest forms of civilization. The result has been that the governing race in Turkey have remained nearly stationary, while many of their subjects, and all the neighbouring States, have been making great progress. The government of the Porte is negligently, and in some cases oppressively carried on. Most of its Christian subjects are connected by the ties of religion and nationality with some of the inhabitants of the neighbouring countries, who are generally prepared to sympathise with and encourage them in any efforts to throw off the authority of the Porte. The result of this state of things has been to leave Turkey in Europe in a condition of chronic disturbance. Insurrections have been numerous, and owing to the encouragement received by the insurgents from outside, have in some cases been very difficult to quell. In several instances these insurrections have led other European States to interfere between the Porte and its subjects, either on the ground that the Porte would not redress the wrongs of which the insurgents justly complained, or that the treatment of the Christians by the Mohammedans was such as could not be tolerated. The mere fact of the subjects of Turkey calling themselves Christians, although the term Christianity means something very different there to what it does in the west of Europe, has caused them to receive much more sympathy and support than in many cases they really deserved.

These interferences, so long as force was not used to coerce the government of the Sultan, may be justified in international law. Turkey is certainly an independent sovereign State, and *primâ facie* no other States have a right to interfere in its internal affairs. But it is not an independent State in the sense that England and France are independent. It owes its independence in recent times to the support it has received from the great Powers, and this consequently gives those Powers some right to require that its government shall be properly administered. But this right is not so extensive as to justify the use of force, and this is so not only on general principles, but by express declaration in treaties.

The unfortunate error underlying all attempts to improve the condition of European Turkey has been to suppose that, because this country

was situated in Europe, it was therefore capable of being benefitted by European institutions and the introduction of European modes of thought and action. But this is not the case. The Turks and many of their subjects are Orientals, and quite different from Europeans; and institutions which have proved most beneficial in England and France are very likely to have quite an opposite effect when established in Turkey. No institutions can be advantageous to a country unless they are adapted to the habits and ideas of the people.

The unsatisfactory condition of Turkey makes it probable that, if left to herself, her empire in Europe might gradually crumble away, leaving the country split up into small and defenceless communities. But her geographical situation would make such a result dangerous to the peace of Europe. If the authority of the Sultan were removed, his territories might pass into the hands of Russia, Austria, or some other great State, and this might seriously alter the balance of power in Europe. The great importance of keeping Constantinople and the Straits of the Bosphorus and Dardanelles in the hands of a non-aggressive State, and of preventing Russia from planting her authority there, and converting the Black Sea into a Russian lake, has led the Western Powers, and especially England, to support and strengthen the authority of the Porte as much as possible. This was the policy that brought about the Crimean war; and until the Treaty of Berlin was executed, the maintenance in its integrity of the Ottoman Empire was one of the most firmly established principles of public law. Nor has the principle been yet abandoned. The Treaty of Berlin, though depriving the Sultan of a considerable portion of his European territories, professes to strengthen and consolidate the remainder, so as to leave him as powerful as the reduced area of his authority will allow him to be.

§ 70b. The Treaty of Paris.

By the Treaty of Paris, 1856, which closed the Crimean war, England, Austria, France, Prussia, Russia, and Sardinia declared "the Sublime Porte admitted to participate in the advantages of the public law and system of Europe. Their Majesties engage, each on his part, to respect the independence and the territorial integrity of the Ottoman Empire; guarantee in common the strict observance of their engagement; and will, in consequence, consider any act tending to its violation as a question of general interest." A separate treaty to the same effect was entered into between England, France, and Austria, on the 15th April, 1856 (z). Thus on two separate occasions in 1856, the great Powers solemnly agreed to support the Ottoman Empire, and maintain it in its integrity. And it was further stipulated in the Treaty of Paris that "if there should arise between the Sublime Porte and one or more of the other signing Powers, any misunderstanding which might endanger the maintenance of their relations, the Sublime Porte and each of such Powers, before having recourse to the use of force, shall afford the other contracting parties the opportunity of preventing such an extremity by means of their mediation" (a). The condition of the Christian subjects of the Porte was also considered in the Treaty; and a firman issued by

(z) [Hertslet, Map of Europe, Vol. ii., pp. 1255, 1280.]
(a) [Art. viii. See Appendix F., *post*, p. 705].

the Sultan for "ameliorating their condition without distinction of religion or race," was communicated to the contracting parties. At the same time it was distinctly acknowledged that this firman "cannot, *in any case*, give to the said Powers the right to interfere, either collectively or separately, in the relations of His Majesty the Sultan with his subjects, nor in the internal administration of his empire" (*b*). The international *status* of Turkey was thus clearly defined. She was recognised as a sovereign State, whose maintenance was deemed necessary for the welfare of Europe; and the only right over her internal administration acquired by the Powers, was that already referred to, of pressing their advice on the Porte as to its methods of governing, but not of insisting by force of arms that this advice should be followed.

§ 70 c. The Treaty and Declaration of London, 1871.

The first attempt to overthrow the Treaty of Paris took place in 1870. On the 31st of October in that year, Russia addressed a note to England on the subject of the neutralization of the Black Sea, the terms of which had been defined in the Treaty of 1856. In this note, Prince Gortchakoff asserted the principle of neutralization to be no more than a theory. "The Treaty of 1856," wrote the Prince, "has, moreover, not escaped the modifications to which most European transactions have been exposed, and in the face of which it would be difficult to maintain that the written law, founded upon the respect for treaties as the basis of public right, and regulating the relations between States, retains the moral validity which it may have possessed at other times." He then enumerated some alleged infractions of the treaty, and continued: "Our illustrious Master cannot admit, *de jure*, that treaties violated in several of their essential and general clauses, should remain binding in other clauses directly affecting the interests of his Empire." He concluded by stating that "His Majesty (the Czar) restores to the Sultan the full exercise of his rights in this respect, resuming the same for himself" (*c*). Such a proceeding was utterly subversive of all international morality. If treaties solemnly entered into could be set aside at the mere wish of one of the contracting parties, all public faith was at an end; and no security could be felt as to the binding effect of any treaty whatever. To this note Lord Granville replied on the part of England, that it had always been held, that the right of cancelling a treaty belongs only to the Governments who have been parties to the original instrument, and that whether the desire of Russia to be freed from the Treaty of Paris were reasonable or not, she could not by her own act abrogate any of its terms. He stated that Her Majesty's Government could not give their sanction to the course announced by Prince Gortchakoff, which he characterised as a very dangerous precedent as to the validity of international obligations (*d*).

On the 22nd of November, 1870, a conference to discuss the matter was proposed by Prussia, and ultimately it was agreed that Plenipotentiaries from the signatory Powers should meet in London. Before discussing the actual point raised by Russia, viz., the de-neutralization of the Black Sea, it was deemed advisable to put forward the

(*b*) [Art. ix]. (*c*) [Hertslet, Map of Europe vol. iii., p. 1893].
(*d*) [Ibid., p. 1898].

following Declaration: "The Plenipotentiaries of North Germany, of Austria-Hungary, of Great Britain, of Russia, and of Turkey, assembled to-day in conference, recognise that it is an essential principle of the law of nations that no Power can liberate itself from the engagements of a treaty, nor modify the stipulations thereof, unless with the consent of the contracting Powers by means of an amicable arrangement" (e). It is melancholy to think that the most civilised Powers of the world should have considered it necessary to put forward such a declaration in the year 1871. It shows that international law, however much talked of and appealed to, has not yet acquired that moral force by which alone the welfare of nations in their mutual intercourse can be secured. After solemnly enunciating this elementary principle, the Powers then proceeded to comply with the demands of Russia, which had first been put forward in direct opposition to it, and a new treaty relative to the Black Sea was entered into.

§ 70d. Insurrection in Herzegovina.

The binding force of the Treaty of Paris was shaken, but not destroyed, in 1871. It was not until 1875 that the recent complications of the Eastern Question commenced. Early in that year an insurrection broke out in Herzegovina, which lasted throughout the year, and gained ground by receiving encouragement from Servia and Montenegro. Various efforts were made by the other Powers to reconcile the differences between the Porte and its subjects. The first collective attempt was initiated by Austria, and put forward in a document which has since become known as the Andrassy Note. This was issued on the 30th of December, 1875, and was agreed to by the other Powers; but its terms were deemed inadmissible by Turkey, and it was finally rejected altogether. The Andrassy Note having proved a failure, another proposal was put forward in May, 1876, and is now known as the Berlin Memorandum. This was issued by Austria, Russia, and Germany, and was agreed to by France and Italy. But England declined to join in pressing the acceptance of the proposals contained in it upon the Porte, and in a despatch dated 19th May, 1876, Lord Derby explained the reasons for this refusal. Her Majesty's Government were of opinion that the course recommended would tend to strengthen instead of quelling the insurrection; that the Porte did not possess the funds necessary for doing what was asked of it; that some of the points proposed would reduce the Sultan's authority to nullity in the disturbed districts; and that if the insurgents knew that the Powers would intervene further in their behalf, if they continued the insurrection after the suggested armistice was over, they would be perfectly certain to continue the insurrection. This scheme also fell through without being productive of any result.

Before the next attempt at pacification was made, the whole aspect of the question had changed. The "Bulgarian Atrocities," a massacre of Christians by Mahommedans caused by the fear of an universal rising of the former, had been perpetrated, and had caused the feeling of Europe to be for the time unfavourable to Turkey. War had broken out between Turkey and Servia; a large Russian force was being assembled

(e) [Hertslet, Map of Europe, vol. iii. p. 1904].

on the borders of Roumania; and the insurrection in Herzegovina somehow ceased to exist and dropped out of all notice.

§ 70e. Conference of Constantinople.

A Conference for the settlement of the whole question was then proposed by England. The Conference did meet, but its proposals, although considerably modified during the discussions, were ultimately rejected by Turkey as inconsistent with her independence. On the 31st of March, 1877, a final protocol was submitted to the Porte, in which the Powers expressed a hope that Turkey would ameliorate the condition of her Christian subjects, and that, should she fail in this, "they (the Powers) think it right to declare that such a state of affairs would be incompatible with their interests, and those of Europe in general. In such a case they reserve to themselves to consider in common as to the means which they may deem best fitted to secure the well-being of the Christian populations, and the interests of the general peace" (*f*). The Porte, in its reply, regretted that it had not been invited to take part in the deliberations preceding the protocol, although they affected its vital interests, and it therefore felt "imperiously obliged to assert itself against the authority of such a precedent" (*g*).

§ 70f. Outbreak of war with Russia.

Up to this time the Powers had acted strictly in accordance with international law, but a different course was now adopted. On the 19th of April, Russia issued a circular note, in which it was announced that her government had exhausted all the means in its power to bring about a lasting pacification of Turkey. That as these had failed the Czar was resolved to undertake this work himself, and had therefore given his armies the orders to cross the frontiers of Turkey, in other words, had declared war (*h*). To this Lord Derby replied on the 1st of May that "the course on which the Russian government had entered . . . . . is in contravention of the stipulation of the Treaty of Paris, 1856, by which Russia and the other signatory Powers engaged, each on its own part, to respect the independence and territorial integrity of the Ottoman empire." That by so doing the Czar had separated himself from the European concert hitherto maintained, and had violated the Declaration of London, 1871 (*i*). Nevertheless the war proceeded, and resulted in the overthrow of Turkey. Roumania and Servia threw off the sovereignty of the Porte, joined Russia in the war, and declared themselves independent. On the 3rd of March, 1878, a preliminary treaty of peace was signed between the belligerents at San Stephano. As this treaty made immense alterations in the existing state of things, and as its whole tenor and most of its clauses affected the arrangements made by the Treaty of Paris, it was clearly an invalid document. The Treaty of Paris had been signed by all the great Powers, and their united action could alone dissolve or alter any part of it. Accordingly the Austrian government proposed that a Conference or Congress (which Lord Beaconsfield considers synonymous terms) should meet to discuss the treaty of San Stephano, and ratify or reject such of its provisions as might be thought best. The Russian government raised several technical objections to communicating the whole of

(*f*) [Parl. Papers, Turkey, No. 9 (1877), p. 2].
(*g*) [Parl. Papers, Turkey, No. 12 (1877), p. 5].
(*h*) [Parl. Papers, Turkey, No. 18 (1877), p. 2]. (*i*) [Ibid. p. 3].

this treaty to the Congress, but finally, through the firm attitude of England, it was agreed that a Congress should meet at Berlin and freely discuss every clause (*g*).

§ 70g. Secret agreements of England with Russia and Turkey.

Before the final consent of Russia was obtained, a secret understanding was entered into between her and England, by which the latter agreed not to oppose certain of the demands of Russia at the Congress. This was published through the treachery of one of the English Foreign Office clerks, and its effect was somewhat to lower the prestige England had recently gained as the champion of international law. But in this there was nothing contrary to that law. The fact that England would not resist certain Russian proposals would not prevent other governments from doing so if they thought fit. And if, when these matters came to be actually discussed, England would not oppose them, there could be no objection to informing Russia on this point beforehand, especially as without some such understanding it seemed probable that the Congress would not meet at all. Another secret agreement, but this time formulated into a treaty, was made between England and Turkey. By this England undertook, if Russia retained Batoum, Ardahan, Kars, or any of them, and made any future attempt to take possession of any of the Sultan's territories in Asia, to join the Sultan in defending those territories by force of arms. In return, the Sultan promised to introduce such reforms into the country as might be agreed upon, and consented to assign the island of Cyprus to be occupied and administered by England. This convention was only to last while Russia retained her conquests in Armenia (*h*).

§ 70h. Congress of Berlin.

The Congress met at Berlin, and on the 13th of July, 1878, a final treaty for the settlement of the whole question was agreed to. This entirely superseded the treaty of San Stephano, and materially altered the stipulations of the Treaty of Paris. Roumania, Servia, and Montenegro were declared independent, and certain portions of territory were added to each. A new principality, under the name of Bulgaria, was formed out of the region lying between the Danube and the Balkans. It was declared autonomous and tributary under the sovereignty of the Sultan, but with a Christian government and a national militia; and its position is somewhat similar to that occupied by Roumania and Servia before the war. An anomalous province called Eastern Roumelia was formed south of the Balkans. The Sultan was left the right of defending the frontiers of this province, but internal order was to be maintained by a native gendarmerie assisted by a local militia. Regular troops were not to be allowed to remain in it unless called for by the Christian Governor-General. The portion of Bessarabia at the mouth of the Danube taken from Russia and given to Roumania in 1856, was restored to Russia. In Asia the territories of Ardahan, Kars, and Batoum were taken from Turkey and given to Russia. And, finally, the Treaties of Paris, 1856, and of London, 1871, were maintained in all such provisions as were not abrogated by these stipulations (*i*).

(*g*) [See Lord Salisbury's despatch of 1st April, 1878. Parl. Papers, Turkey, No. 27 (1878).]

(*h*) [Parl. Papers, Turkey, No. 36 (1878). See Appendix F. p. 730.]

(*i*) [See this Treaty in Appendix F. p. 713.]

The interference of the five great European powers represented in the conference of London, in the Belgic Revolution of 1830, affords an example of the application of this right to preserve the general peace, and to adapt the new order of things to the stipulations of the treaties of Paris and Vienna, by which the kingdom of the Netherlands had been created. We have given, in another work, a full account of the long and intricate negotiations relating to the separation of Belgium from Holland, which assumed alternately the character of a pacific mediation and of an armed intervention, according to the varying circumstances of the contest, and which was finally terminated by a compromise between the two great opposite principles which so long threatened to disturb the established order and general peace of Europe. The Belgic Revolution was recognized as an accomplished fact, whilst its legal consequences were limited within the strictest bounds, by refusing to Belgium the attributes of the rights of conquest and of postliminy, and by depriving her of a great part of the province of Luxembourg, of the left bank of the Scheldt, and of the right bank of the Meuse. The five great powers, representing Europe, consented to the separation of Belgium from Holland, and admitted the former among the independent States of Europe, upon conditions which were accepted by her and have become the bases of her public law. These conditions were subsequently incorporated into a definite treaty, concluded between Belgium and Holland in 1839, by which the independence of the former was finally recognized by the latter (*f*).

§ 71. Interference of the five great European powers in the Belgic revolution of 1830.

Every State, as a distinct moral being, independent of every other, may freely exercise all its sovereign rights in any manner not inconsistent with the equal rights of other States. Among these is that of establishing, altering, or abolishing its own municipal constitution of government. No foreign State can lawfully interfere with the exercise of this right, unless such interference is authorized by some special compact, or by such a clear case of necessity as immediately affects its own independence, freedom, and security. Non-interference is the general rule, to which cases of justifiable interference form exceptions limited by the necessity of each particular case.

§ 72. Independence of the State in respect to its internal government.

The approved usage of nations authorizes the proposal by

§ 73. Mediation of foreign

(*f*) Wheaton's Hist. of the Law of Nations, pp. 538—555.

States for the settlement of the internal dissensions of a State. Treaties of mediation and guaranty.

one State of its good offices or mediation for the settlement of the intestine dissensions of another State. When such offer is accepted by the contending parties, it becomes a just title for the interference of the mediating power.

Such a title may also grow out of positive compact previously existing, such as treaties of mediation and guaranty. Of this nature was the guaranty by France and Sweden of the Germanic Constitution at the peace of Westphalia in 1648, the result of the thirty years' war waged by the princes and States of Germany for the preservation of their civil and religious liberties against the ambition of the House of Austria.

The Republic of Geneva was connected by an ancient alliance with the Swiss Cantons of Berne and Zurich, in consequence of which they united with France, in 1738, in offering the joint mediation of the three powers to the contending political parties by which the tranquillity of the republic was disturbed. The result of this mediation was the settlement of a constitution, which giving rise to new disputes in 1768, they were again adjusted by the intervention of the mediating powers. In 1782, the French government once more united with these Cantons and the court of Sardinia in mediating between the aristocratic and democratic parties; but it appears to be very questionable how far these transactions, especially the last, can be reconciled with the respect due, on the strict principles of international law, to the just rights and independence of the smallest, not less than to those of the greatest States (*g*).

The present constitution of the Swiss Confederation was also adjusted, in 1813, by the mediation of the great allied powers, and subsequently recognized by them at the Congress of Vienna as the basis of the federative compact of Switzerland. By the same act the united Swiss Cantons guarantee their respective local constitutions of government (*h*).

So also the local constitutions of the different States composing the Germanic Confederation may be guaranteed by the Diet on the application of the particular State in which the constitution is established; and this guaranty gives the Diet

(*g*) Flassan, Histoire de la Diplomatie Française, tom. v. p. 78; tom. vii. pp. 27, 297.
(*h*) Acte Final du Congrès de Vienne, art. 74.

the right of determining all controversies respecting the interpretation and execution of the constitution thus established and guaranteed (*i*).

And the Constitution of the United States of America guarantees to each State of the federal Union a republican form of government, and engages to protect each of them against invasion, and, on application of the local authorities, against domestic violence (*k*).

§ 73a. Proposed mediation in the American civil war.

In 1862, a proposition was made by France to England and Russia, that the three countries should offer their friendly mediation to the contending parties in the American civil war. The moment was deemed inopportune by Russia, and England declined to accede to the proposal. "According to the information we possess," wrote Prince Gortchacow to M. D'Oubil, Russian *chargé d'affaires* in Paris, on the 27th Oct., 1862, "we are led to believe that a combined movement of France, England, and Russia, however conciliatory it might be, and with whatsoever precautions it might be surrounded, if it came with an official and collective character, would incur the risk of bringing about a result opposed to the pacificatory end which the three Courts desire" (*l*). The proposal would have been declined had it been made. It was thought in the Northern States that the policy of France was hostile to the Union, and that the proposed mediation was only a preliminary step to the acquisition by France of those parts of the dismembered Union which had formerly belonged to her (*m*).

§ 74. Independence of every State in respect to the choice of its rulers.

This perfect independence of every sovereign State, in respect to its political institutions, extends to the choice of the supreme magistrate and other rulers, as well as to the form of government itself. In hereditary governments, the succession to the crown being regulated by the fundamental laws, all disputes respecting the succession are rightfully settled by the nation itself, independently of the interference or control of foreign powers. So also in elective governments, the choice of the chief or other magistrates ought to be freely made, in the manner prescribed by the constitution of the State, without the intervention of any foreign influence or authority (*n*).

(*i*) Wiener Schluss-Acte, vom 15 Mai, 1820, art. 62. Corpus Juris Germanici, von Mayer, tom. ii. p. 196.
(*k*) Constitution of the United States, art. 3.
(*l*) [U. S. Dipl. Cor. 1863, vol. ii. p. 769].
(*m*) [Draper, Hist. of American Civil War, vol. iii. p. 439].
(*n*) Vattel, Droit des Gens, liv. i. ch. 5, §§ 66, 67.

§ 75. Exceptions growing out of compact or other just right of intervention.

The only exceptions to the application of these general rules arise out of compact, such as treaties of alliance, guarantee, and mediation, to which the State itself whose concerns are in question has become a party; or formed by other powers in the exercise of a supposed right of an intervention growing out of a necessity involving their own particular security, or some contingent danger affecting the general security of nations. Such, among others, were the wars relating to the Spanish succession, in the beginning of the eighteenth century, and to the Bavarian and Austrian successions, in the latter part of the same century. The history of modern Europe also affords many other examples of the actual interference of foreign powers in the choice of the sovereign or chief magistrate of those States where the choice was constitutionally determined by popular election, or by an elective council, such as in the cases of the head of the Germanic Empire, the King of Poland, and the Roman pontiff; but in these cases no argument can be drawn from the fact to the right. In the particular case, however, of the election of the pope, who is the supreme pontiff of the Roman Catholic Church, as well as a temporal sovereign, the Emperor of Austria, and the Kings of France and Spain have, by ancient usage, each a right to exclude one candidate (*o*).

§ 76. Quadruple alliance of 1834, between France, Great Britain, Portugal, and Spain.

The quadruple alliance, concluded in 1834 between France, Great Britain, Spain, and Portugal, affords a remarkable example of actual interference in the questions relating to the succession to the crown in the two latter kingdoms, growing out of compacts to which they were parties, formed in the exercise of a supposed right of interference for the preservation of the peace of the Peninsula as well as the general peace of Europe. Having already stated in another work the historical circumstances which gave rise to the quadruple alliance, as well as its terms and conditions, it will only be necessary here to recapitulate the leading principles, which may be collected from the debate in the British Parliament, in 1835, upon the measures adopted by the British Government to carry into effect the stipulations of the treaty.

1. The legality of the order in council permitting British subjects to engage in the military service of the Queen of

(*o*) Klüber, Droit des Gens Moderne de l'Europe, Pt. II. tit. 1, ch. 2, § 43.

Spain, by exempting them from the general operation of the act of Parliament of 1819, forbidding them from enlisting in foreign military service, was not called in question by Sir Robert Peel and the other speakers on the part of the opposition. Nor was the obligation of the treaty of quadruple alliance, by which the British Government was bound to furnish arms and the aid of a naval force to the Queen of Spain, denied by them. Yet it was asserted, that without a declaration of war, it would be with the greatest difficulty that the special obligation of giving naval aid could be fulfilled, without placing the force of such a compact in opposition to the general binding nature of international law. Whatever might be the special obligation imposed on Great Britain by the treaty, it could not warrant her in preventing a neutral State from receiving a supply of arms. She had no right, without a positive declaration of war, to stop the ships of a neutral country on the high seas.

2. It was contended that the suspension of the foreign enlistment law was equivalent to a direct military interference in the domestic affairs of another nation. The general rule on which Great Britain had hitherto acted was that of non-interference. The only exceptions admitted to this rule were cases where the necessity was urgent and immediate; affecting, either on account of vicinage, or some special circumstances, the safety or vital interests of the State. To interfere on the vague ground that British interests would be promoted by the intervention; on the plea that it would be for their advantage to see established a particular form of government in Spain, would be to destroy altogether the general rule of non-intervention, and to place the independence of every weak power at the mercy of its formidable neighbours. It was impossible to deny that an act which the British government permitted, authorizing British soldiers and subjects to enlist in the service of a foreign power, and allowing them to be organized in Great Britain, was a recognition of the doctrine of the propriety of assisting by a military force a foreign government against an insurrection of its own subjects. When the Foreign Enlistment Bill was under consideration in the House of Commons, the particular clause which empowered the king in council to suspend its operation was objected to on the ground,

that if there was no foreign enlistment act, the subjects of Great Britain might volunteer in the service of another country, and there could be no particular ground of complaint against them; but that if the king in council were permitted to issue an order suspending the law with reference to any belligerent nation, the government might be considered as sending a force under its own control.

Lord Palmerston, in reply, stated:—1. That the object of the treaty of quadruple alliance, as expressed in the preamble, was to establish internal peace throughout the Peninsula, including Spain as well as Portugal; the means by which it was proposed to effect that object was the expulsion of the infants Don Carlos and Dom Miguel from Portugal. When Don Carlos returned to Spain, it was thought necessary to frame additional articles to the treaty in order to meet the new emergency. One of these additional articles engaged His Britannic Majesty to furnish Her Catholic Majesty with such supplies of arms and warlike stores as Her Majesty might require, and further to assist Her Majesty with a naval force. The writers on the law of nations all agreed that any Government, thus stipulating to furnish arms to another, must be considered as taking an active part in any contest in which the latter might be engaged; and the agreement to furnish a naval force, if necessary, was a still stronger demonstration to that effect. If, therefore, the recent order in council was objected to on the ground that it identified Great Britain with the cause of the existing government of Spain, the answer was, that, by the additional articles of the quadruple treaty, that identification had already been established, and that one of those articles went even beyond the measure which had been impugned.

2. As to what had been alleged as to the danger of establishing a precedent for the interference of other countries, he would merely observe; that in the first place this interference was founded on a treaty arising out of the acknowledged right of succession of a sovereign, decided by the legitimate authorities of the country over which she ruled. In the case of a civil war proceeding either from a disputed succession, or from a prolonged revolt, no writer on international law denied that other countries, had a right, if they chose to exercise it,

to take part with either of the two belligerent parties. Undoubtedly it was inexpedient to exercise that right except under circumstances of a peculiar nature. That right, however, was general. If one country exercised it, another might equally exercise it. One State might support one party, another the other party: and whoever embarked in either cause must do so with their eyes open to the full extent of the possible consequences of their decision. He contended, therefore, that the measure under consideration established no new principle, and that it created no danger as a precedent. Every case must be judged by the considerations of prudence which belonged to it. The present case, therefore, must be judged by similar considerations. All that he maintained was, that the recent proceeding did not go beyond the spirit of the engagement into which Great Britain had entered, that it did not establish any new principle, and that the engagement was quite consistent with the law of nations (*p*).

§ 76a. Intervention in Mexico in 1861.

In 1861, there occurred a remarkable intervention in the affairs of Mexico, which is thus described in the Queen's Speech on the opening of Parliament: "The wrongs committed by various parties and by successive governments in Mexico upon foreigners resident within Mexican territory, and for which no satisfactory redress could be obtained, have led to the conclusion of a convention between Her Majesty, the Emperor of the French, and the Queen of Spain, for the purpose of regulating a combined operation on the coast of Mexico, with a view to obtain that redress which has hitherto been withheld" (*q*). The contracting powers "engaged not to seek for themselves, in the employment of the contemplated coercive measures, any acquisition of territory, or any special advantage, nor to exercise in the internal affairs of Mexico any influence of a nature to prejudice the right of the Mexican nation to choose and constitute the form of its government" (*r*).

The main reason for this intervention was to obtain the payment of debts contracted by the Mexican government. The amount due to England was very large, while that owing to France was comparatively small, yet the Emperor Napoleon thought fit to go much further than simply obtaining satisfaction for the claims of France. He set up the unfortunate Maximilian as Emperor of Mexico, and then, withdrawing the French troops, left him to maintain his throne by his own resources, and to be finally murdered by the subjects upon whom he had been forced. England and Spain refused to assist France in these

(*p*) Wheaton's Hist. Law of Nations, pp. 523—538.
(*q*) [Annual Register, 1862, p. 5].
(*r*) [Convention of Oct. 31, 1861, art. ii. Hertslet's Treaties, vol. xii. p. 475].

proceedings, and withdrew from the intervention when their claims had been satisfied. The United States were invited to join the allies, but declined, and it subsequently appeared that France was desirous of setting up a powerful Latin State on the continent of America in opposition to the United States (*s*). It is fortunate that England has not since followed this precedent, and intervened in all cases where States have made default in paying debts due to British subjects. It was unjustifiable in the case of Mexico, and would be not only unjustifiable but impossible at the present time from the course such commercial transactions have taken, and the number of defaulting States. M. Calvo justly says that this intervention "constitue pour les puissances qui s'y sont laissé entraîner un précédent aussi peu digne d'éloges que funeste à leur considération et à leurs intérêts" (*t*).

§ 76b. The French garrison in Rome.

The maintenance of a French garrison in Rome was an altogether anomalous proceeding. In 1856, the Emperor Napoleon occupied Rome. His troops were kept there on the ground that the Pope required to be protected in the exercise of his spiritual functions as head of the Catholic Church. The garrison was partly withdrawn in 1864 (*u*), but returned in 1868, owing to the aggressive attitude of the revolutionary party in Italy, and the invasion of the Papal States by Garibaldi. However, on the 19th of August, 1870, the French troops evacuated Rome, and what was left of the Papal States was afterwards incorporated into the kingdom of Italy, leaving the Pope nothing but the Vatican (*x*). But it was not until 1874 that the last trace of the French occupation disappeared from Rome. Up to that date the *Orenoque*, a French ship of war, was moored off Civita Vecchia, ostensibly to assist the Pope should he be in difficulties, and she was not removed until the 12th of October in that year (*y*).

(*s*) [See Phillimore, vol. i. p. 507].
(*t*) [Droit International, vol. i. § 118 (2nd ed.), p. 239].
(*u*) [Hertslet, Map of Europe, vol. ii. p. 1627].
(*x*) [Ibid., p. 1628].
(*y*) [Annual Register, 1874, p. 193].

CHAPTER II.

RIGHTS OF CIVIL AND CRIMINAL LEGISLATION.

§ 77. Exclusive power of civil legislation.

EVERY independent State is entitled to the exclusive power of legislation, in respect to the personal rights and civil state and condition of its citizens, and in respect to all real and personal property situated within its territory, whether belonging to citizens or aliens. But as it often happens that an individual possesses real property in a State other than that of his domicile, or that contracts are entered into and testaments executed by him, or that he is interested in successions *ab intestato*, in a country different from either; it may happen that he is, at the same time, subject to two or three sovereign powers; to that of his native country or of his domicile, to that of the place where the property in question is situated, and to that of the place where the contracts have been made or the acts executed. The allegiance to the sovereign power of his native country exists from the birth of the individual, and continues till a change of nationality. In the two other cases he is considered subject to the laws, but only in a limited sense. In the foreign countries where he possesses real property, he is considered a non-resident landowner (*sujet forain*); in those in which the contracts are entered into, a temporary resident (*sujet passager*). As, in general, each of these different countries is governed by a distinct legislation, conflicts between their laws often arise; that is to say, it is frequently a question which system of laws is applicable to the case. The collection of rules for determining the conflicts between the civil and criminal laws of different States, is called private international law, to distinguish it from public international law, which regulates the relations of States (*a*).

Private international law.

(*a*) Fœlix, Droit International Privé, § 3. [Story, Conflict of Laws, §§ 9, 10, 11. Kent, Comm. vol. ii. p. 39. Westlake, § 1].

§ 78. Conflict of laws.

The first general principle on this subject results immediately from the fact of the independence of nations. Every nation possesses and exercises exclusive sovereignty and jurisdiction throughout the full extent of its territory. It follows, from this principle, that the laws of every State control, of right, all the real and personal property within its territory, as well as the inhabitants of the territory, whether born there or not, and that they affect and regulate all the acts done, or contracts entered into within its limits.

Consequently, "every State possesses the power of regulating the conditions on which the real or personal property, within its territory, may be held or transmitted; and of determining the state and capacity of all persons therein, as well as the validity of the contracts and other acts which arise there, and the rights and obligations which result from them; and, finally, of prescribing the conditions on which suits at law may be commenced and carried on within its territory." (*b*)

The second general principle is, "that no State can, by its laws, directly affect, bind, or regulate property beyond its own territory, or control persons who do not reside within it, whether they be native-born subjects or not. This is a consequence of the first general principle; a different system, which would recognize in each State the power of regulating persons or things beyond its territory, would exclude the equality of rights among different States, and the exclusive sovereignty which belongs to each of them." (*c*)

From the two principles, which have been stated, it follows that all the effect, which foreign laws can have in the territory of a State, depends absolutely on the express or tacit consent of that State. A State is not obliged to allow the application of foreign laws within its territory, but may absolutely refuse to give any effect to them. It may pronounce this prohibition with regard to some of them only, and permit others to be operative, in whole or in part. If the legislation of the State is positive either way, the tribunals must necessarily conform to it. In the event only of the law being silent, the courts may judge, in the particular cases, how to follow the foreign laws, and to apply their provisions. The express

(*b*) Fœlix, Droit International Privé, § 9. (*c*) Ibid. § 10.

consent of a State, to the application of foreign laws within its territory, is given by acts passed by its legislative authority, or by treaties concluded with other States. Its tacit consent is manifested by the decisions of its judicial and administrative authorities, as well as by the writings of its publicists.

§ 79. No obligation as to foreign laws.

There is no obligation, recognised by legislators, public authorities, and publicists, to regard foreign laws; but their application is admitted, only from considerations of utility and the mutual convenience of States—*ex comitate, ob reciprocam utilitatem.* The public good and the general interests of nations have caused to be accorded, in every State, an operation more or less extended to foreign laws. Every nation has found its advantage in this course. The subjects of every State have various relations with those of other States; they are interested in the business transacted and in the property situate abroad. Thence flows the necessity, or at least utility, for every State, in the proper interest of its subjects, to accord certain effects to foreign laws, and to acknowledge the validity of acts done in foreign countries, in order that its subjects may find in the same countries a reciprocal protection for their interests. There is thus formed a tacit convention among nations for the application of foreign laws, founded upon reciprocal wants. This understanding is not the same everywhere. Some States have adopted the principle of complete reciprocity, by treating foreigners in the same manner as their subjects are treated in the country to which they belong; other States regard certain rights to be so absolutely inherent in the quality of citizens as to exclude foreigners from them; or they attach such an importance to some of their institutions, that they refuse the application of every foreign law incompatible with the spirit of those institutions. But, in modern times, all States have adopted, as a principle, the application within their territories of foreign laws; subject, however, to the restrictions which the rights of sovereignty and the interests of their own subjects require. This is the doctrine professed by all the publicists who have written on the subject (*d*).

(*d*) [*Caldwell* v. *Vanvlissigen*, 9 Hare, 425].

"Above all things," says President Bohier, "we must remember that, though the strict rule would authorise us to confine the operation of laws within their own territorial limits, their application has, nevertheless, been extended, from considerations of public utility, and oftentimes even from a kind of necessity. But, when neighbouring nations have permitted this extension, they are not to be deemed to have subjected themselves to a foreign statute; but to have allowed it, only because they have found in it their own interest by having, in similar cases, the same advantages for their own laws among their neighbours. This effect given to foreign laws is founded on a kind of comity of the law of nations; by which different peoples have tacitly agreed that they shall apply, whenever it is required by equity and common utility, provided they do not contravene any prohibitory enactment." (*e*)

§ 80. Rules laid down by Huberus.

Huberus, one of the earliest and best writers on this subject, lays down the following general maxims, as adequate to solve all the intricate questions which may arise respecting it:—

1. The laws of every State have force within the limits of that State, and bind all its subjects.

2. All persons within the limits of a State are considered as subjects, whether their residence is permanent or temporary.

3. By the comity of nations, whatever laws are carried into execution within the limits of any State, are considered as having the same effect everywhere, so far as they do not occasion a prejudice to the rights of other States and their citizens.

From these maxims, Huberus deduces the following general corollary, as applicable to the determination of all questions arising out of the conflict of the laws of different States, in respect to private rights of persons and property.

All transactions in a court of justice, or out of court, whether testamentary or other conveyances, which are regularly done or executed according to the law of any particular place, are valid, even where a different law prevails, and where, had they been so transacted, they would not have been valid. On the

(*e*) Bohier, Observations sur la coutume de Bourgogne, ch. 23, §§ 62, 63, p. 457.

other hand, transactions and instruments which are done or executed contrary to the laws of a country, as they are void at first, never can be valid; and this applies not only to those who permanently reside in the place where the transaction or instrument is done or executed, but to those who reside there only temporarily; with this exception only, that if another State, or its citizens, would be affected by any peculiar inconvenience of an important nature, by giving this effect to acts performed in another country, that State is not bound to give effect to those proceedings, or to consider them as valid within its jurisdiction (*f*).

§ 81. *Lex loci rei sitæ.*

Thus, real property is considered as not depending altogether upon the will of private individuals, but as having certain qualities impressed upon it by the laws of that country where it is situated, and which qualities remain indelible, whatever the laws of another State, or the private dispositions of its citizens, may provide to the contrary. That State, where this real property is situated, cannot suffer its own laws in this respect to be changed by these dispositions, without great confusion and prejudice to its own interests. Hence it follows, that the law of a place where real property is situated governs exclusively as to the tenure, the title, and the descent of such property (*g*).

This rule is applied, by the international jurisprudence of the United States and Great Britain, to the forms of conveyance of real property, both as between different parts of the same confederation or empire, and with respect to foreign countries. Hence it is that a deed or will of real property, executed in a foreign country, or in another State of the Union, must be executed with the formalities required by the laws of that State where the land lies (*h*).

(*f*) Huberus, Prælect. tom. ii. lib. i. tit. 3, de Conflictu Legum.

(*g*) "Fundamentum universæ hujus doctrinæ diximus esse, et tenemus, subjectionem hominum infra leges cujusque territorii, quamdiu illic agunt, quæ facit ut actus ab initio validus aut nullus, alibi quoque valere aut non valere non nequeat. Sed hæc ratio non convenit rebus immobilibus, quando illæ spectantur, non ut dependentes à liberâ dispositione cujusque patrisfamilias, verum quatenus certæ notæ lege cujusque reipublicæ ubi sitæ sunt, illis impressæ reperiuntur; hæ notæ manent indelebiles in istâ republica, quidquid aliarum civitatum leges, aut privatorum dispositiones, secus aut contra statuant; nec enim sine magnâ confusione prejudicioque reipublicæ ubi sitæ sunt res soli, leges de illis latæ, dispositionibus istis mutari possunt." Huberus, liv. i. tit. 3, de Conflictu Leg. § 15.

(*h*) *Robinson* v. *Campbell*, 3 Wheaton, 212; *U. S.* v. *Crosby*, 7 Cranch,

But this application of the rule is peculiar to American and British law. According to the international jurisprudence recognised among the different nations of the European continent, a deed or will, executed according to the law of the place where it is made, is valid; not only as to personal, but as to real property, wherever situated; provided the property is allowed by the *lex loci rei sitæ* to be alienated by deed or will; and those cases excepted, where that law prescribes, as to instruments for the transfer of real property, particular forms, which can only be observed in the place where it is situated, such as the registry of a deed or the probate of a will (*i*).

§ 81a. Reasons for this difference.

The main reason for this divergence lies in the fact that continental conveyancing has always supposed public acts as the rule, and made but a comparatively sparing use of the private documents which constitute Anglo-American titles. The inconvenience arising from the inability to dispose of land unless the owner was in the *lex situs*, naturally led to the rule that conveyances of immovables are rendered valid by the *lex loci actus*. On the other hand, the Anglo-American law prescribes formalities which may be performed anywhere, and are not contrary to the law of any nation, and it therefore justly refuses to give effect to transfers of land, unless such formalities have been complied with (*k*). However, no one maintains that a form expressly imposed as an exclusive one by the *lex situs*, can ever be dispensed with. Thus the French law of the 23rd March, 1855, requires immovable property in France to be transferred *inter vivos* by a transcription in the *bureau des hypothèques*, and no transfer is valid without such transcription (*l*).

This diversity of opinion is now of no great importance, because the laws of most European States have adopted the principle that land is subject to the *lex rei sitæ*. This is done expressly by the codes of Prussia (*m*), Austria (*n*), Saxony (*o*), Italy (*p*), and Greece (*q*). Another

115; [*Coppin* v. *Coppin*, 2 P. W. 291; *Brodie* v. *Barry*, 2 Ves. & Beames, 127; *McGoon* v. *Scales*, 9 Wallace, 23; *Freke* v. *Lord Carberry*, L. R. 16 Eq. 461: Wharton, § 372].

(*i*) Fœlix, Droit International Privé, § 52. "Hinc Frisius habens agros et domos in provinciâ Groningensi, non potest de illis testari, quia lege prohibitum est ibi de bonis immobilibus testari, non valente jure Frisico adficere bona, quæ partes alieni territorii integrantes constituunt. Sed an hoc non obstat ei, quod antea diximus, si factum sit testamentum jure loci validum, id effectum habere etiam in bonis alibi sitis, ubi de illis testari licet? Non obstat; quia legum diversitas in illâ specie non afficit res soli, neque de illis loquitur, sed ordinat actum testandi; quo recte celebrato, lex Reipublicæ non vetat illum actum valere in immobilibus, quatenus nullus character illis ipsis a lege loci impressus læditur aut imminuitur." Huberus, ubi supra.

(*k*) [Westlake, § 82].

(*l*) [Ibid. § 87. Tripier, Codes Français, p. 1618].

(*m*) [Allegemeines Landrecht, Emleitung, § 28].

(*n*) [Oesterreichische Gazette, § 300]. (*o*) [Saxon Civil Code, § 10].]

(*p*) [Law of 25th June, 1865, art. 7]. (*q*) [Civil Code of Greece, art. 5].

point to be decided by the *lex rei sitæ* is the character of the property, that is, whether it be realty or not, for every nation may impress upon property in its dominions any character it pleases (*r*).

§ 82. *Droit d'aubaine.*

The municipal laws of all European countries formerly prohibited aliens from holding real property within the territory of the State. During the prevalence of the feudal system, the acquisition of property in land involved the notion of allegiance to the prince within whose dominions it lay, which might be inconsistent with that which the proprietor owed to his native sovereign. It was also during the same rude ages that the *jus albinagii* or *droit d'aubaine* was established; by which all the property of a deceased foreigner (movable or immovable), was confiscated to the use of the State, to the exclusion of his heirs, whether claiming *ab intestato*, or under a will of the decedent (*s*). In the progress of civilization, this barbarous and inhospitable usage has been, by degrees, almost entirely abolished. This improvement has been accomplished either by municipal regulations, or by international compacts founded upon the basis of reciprocity. Previous to the French Revolution of 1789, the *droit d'aubaine* had been either abolished or modified, by treaties between France and other States; and it was entirely abrogated by a decree of the Constituent Assembly, in 1791, with respect to all nations, without exception and without regard to reciprocity. This gratuitous concession was retracted, and the subject placed on its original footing of reciprocity by the Code-Napoleon, in 1803; but this part of the Civil Code was again repealed, by the Ordinance of the 14th July, 1819, admitting foreigners to the right of possessing both real and personal property in France, and of taking by succession *ab intestato*, or by will, in the same manner with native subjects (*t*).

(*r*) [Story, § 447].

(*s*) Du Cange (Gloss. Med. Ævi, voce *Albinagium* et *Albani*) derives the term from *aubenæ*. Other etymologists derive it from *alibi natus*. During the Middle Age, the Scots were called *Albani* in France, in common with all other aliens; and as the Gothic term *Albanach* is even now applied by the Highlanders of Scotland to their race, it may have been transferred by the continental nations to all foreigners.

(*t*) Rotteck und Welcker, Staats-Lexicon, art. *Gastrecht*, Band 6, § 362. Vattel, liv. ii. ch. viii. §§ 112—114. Klüber, Droit des Gens, Pt. II. tit. 1, ch. ii. §§ 32, 33. Von Mayer, Corp. Jur. Confed. Germanicæ, tom. ii. p. 17. Merlin, Repertoire, tit. *Aubaine*.

The analogous usage of the *droit de détraction*, or *droit de retraite* (jus detractûs), by which a tax was levied upon the removal from one State to another of property acquired by succession or testamentary disposition, has also been reciprocally abolished in most civilized countries.

The stipulations contained in the treaties of 1778 and 1800, between the United States and France, for the mutual abolition of the *droit d'aubaine* and the *droit de détraction* between the two countries, have expired with those treaties; and the provision in the treaty of 1794, between the United States and Great Britain, by which the citizens and subjects of the two countries, who then held lands within their respective territories, were to continue to hold them according to the nature and tenure of their respective estates and titles therein, was limited to titles existing at the signature of the treaty, and is rapidly becoming obsolete by the lapse of time (*u*). But by the stipulations contained in a great number of subsisting treaties, between the United States and various powers of Europe and America, it is provided, that "where on the death of any person holding real estate within the territories of the one party, such real estate would, by the laws of the land, descend on a citizen or subject of the other, were he not disqualified by alienage, such citizen or subject shall be allowed a reasonable time to sell the same, and to withdraw the proceeds without molestation, and exempt from all duties of *détraction* on the part of the government of the respective States (*x*).

§ 82a. Rights of aliens to hold lands in various States.

It is only of late years that the right of holding lands on the same conditions as subjects, has been conceded to foreigners by most countries. In Belgium this was effected by the law of the 27th of April, 1865 (*y*). Russia conceded the privilege in 1860 (*z*). Some of the Swiss cantons do not even now permit foreigners to hold real property without the express permission of the Cantonal Government, unless there be a treaty to that effect (*a*). Austria (*b*),

(*u*) Kent's Comm. vol. ii. pp. 67—69 (5th ed.).
(*x*) Treaty of 1828 between the United States and Prussia, art. 14. Elliott, Am. Diplom. Code, vol. i. p. 388. [See U. S. Diplom. Cor. 1873, vol. ii. p. 1415].
(*y*) [Report of Naturalization Commission, 1869, p. 115].
(*z*) [Ibid. p. 128].
(*a*) [Ibid. p. 131].
(*b*) [Civil Code of Austria, § 33].

the Netherlands (*c*), and Sweden (*d*), only accord the right on condition of reciprocity in the foreigner's country. The constitution of the German Empire provides, that every person belonging to one of the confederated States is to be treated in every other of the confederated States as a born native, and to be permitted to acquire real estate (*e*). But as regards other countries, the laws of Bavaria, Prussia, Saxony, and Wurtemburg, exact for their own subjects, when abroad, the same rights they extend to foreigners in their own dominions (*f*). In Italy, Denmark, and Greece, aliens are under no disabilities in this respect (*g*). The ownership of land in the United States is regulated by the laws of each individual State of the Union. Some of the States impose no restrictions on foreigners (*h*); others require residence and an oath of allegiance (*i*); in others a declaration of an intention to become a naturalized citizen of the United States is necessary (*k*). Feudal principles were maintained so long in England, that until the year 1870 an alien was incapable of holding land for more than twenty-one years, that is, he could not purchase a freehold. This, however, was remedied by the Naturalization Act, 1870 (*l*), which relieved aliens of most of their disabilities, and as regards land, placed them on the same footing as subjects (*m*).

§ 82b. Effect of birth in various States.

There is no uniform rule among nations by which the nationality of a person may be determined from the place of his birth. England and America claim all who are born within their dominions, as natural born subjects or citizens, whatever may have been the parents' nationality (*n*). A child born in Denmark is considered a Dane while he remains in the country (*o*). Birth in Portugal confers Portuguese nationality, unless the father was at the time in the service of a foreign State, or unless the child formally renounces it (*p*).

Complete Dutch nationality is acquired by birth in Holland, if the parents are established there (*q*). In Italy, when an alien has established his domicile in the Kingdom uninterruptedly for ten years, his child is considered a citizen, but residence for commercial purposes does not suffice to confer this *status* (*r*). If a child is born in any other

(*c*) [Civil Code of the Netherlands, §§ 884, 957].
(*d*) [Swedish Statute of Inheritance, "Arfda Balken," ch. 15, § 2].
(*e*) [Art. iii. Hertslet, Map of Europe, vol. iii. p. 1931].
(*f*) [Report of Naturalization Commission, 1869, pp. 114, 124, 129, 138].
(*g*) [Ibid. p. 116. Italian Civil Code, Art. iii. Civil Code of Greece, Art. 5].
(*h*) [Ohio, Michigan, Illinois].
(*i*) [Vermont, N. and S. Carolina].
(*k*) [Connecticut, Maine, Delaware, Maryland, Virginia, Tennessee, Arkansas, Indiana, Missouri. See Rep. of Nat. Comm. p. 131; and U. S. Diplom. Cor., 1873, p. 1414].
(*l*) [33 & 34 Vict. c. 14, s. 2. See Appendix A].
(*m*) [As to British colonies and dependencies, see Rep. of Nat. Comm. 1869, p. 137].
(*n*) [*Calvin's case*, 2 State Tr. 639; *Donegani* v. *Donegani*, 3 Knapp, P. C. 63; *Re Adam*, 1 Moo. P. C. 460. Fourteenth Amendment to U. S. Constitution, U. S. Statutes at Large, vol. xv. p. 706].
(*o*) [G. Brock to Sir C. L. Wyke, 26th July, 1868, Nat. Comm. Rep. p. 143].
(*p*) [Civil Code of Portugal, tit. iii. art. 18, No. 2].
(*q*) [Law of 28th July, 1850, F. O. No. 44, art. 1].
(*r*) [Civil Code of Italy, lib. i. tit. i. art. 8].

European country, he does not acquire its national character, but follows that of his father, if legitimate, and that of his mother, if illegitimate (*s*). However, in Baden (*t*), Belgium (*u*), France (*x*), Greece (*y*), and Spain (*z*), children of alien parents born there, are enabled to acquire the nationality of the country by a declaration made within a year of their coming of age, of their wish to do so. The French law has a further provision, that if the alien father was himself born in France, his child is considered a Frenchman, unless, within the same period, he makes a declaration of his wish to be a foreigner (*a*).

§ 83. *Lex domicilii.*

As to personal property, the *lex domicilii* of its owner prevails over the law of the country where such property is situated, so far as respects the rule of inheritance:—*Mobilia ossibus inhærent, personam sequuntur.* Thus the law of the place, where the owner of personal property was domiciled at the time of his decease, governs the succession *ab intestato* as to his personal effects wherever they may be situated (*b*). Yet it had once been doubted, how far a British subject could, by changing his native domicile for a foreign domicile without the British empire, change the rule of succession to his personal property in Great Britain; though it was admitted that a change of domicile, within the empire, as from England to Scotland, would have that effect (*c*). But these doubts have been overruled in a more recent decision, by the Court of Delegates in England establishing the law, that the actual foreign domicile of a British subject is exclusively to govern, in respect to his testamentary disposition of personal property, as it would in the case of a mere foreigner (*d*).

So also the law of a place where any instrument, relating to personal property, is executed, by a party domiciled in that place, governs, as to the external form, the interpretation, and

(*s*) [Rep. of Nat. Comm. pp. 141—149].
(*t*) [Baden Landrecht, art. 9].
(*u*) [Civil Code of Belgium, art. 9. Law of 27th Sept. 1835, art. 2].
(*x*) [Code Napoleon; Code Civil, liv. i. c. i. § 9].
(*y*) [Civil Code of Greece, arts. 17, 19].
(*z*) [Royal Decree, 17th Nov. 1852].
(*a*) [Law of 29th Jan. and 7th Feb. 1851, art. i.].
(*b*) Huberus, Prælect., tom. ii. lib. i. tit. 3, de Conflict. Leg. §§ 14, 15. Bynkershoek, Quæst. Jur. Pub. lib. i. cap. 16. See also an opinion given by Grotius as counsel in 1613, Henry's Foreign Law, App. p. 196. Merlin, Répertoire, tit. Loi, § 6, No. 3. Fœlix, Droit International Privé, § 37.
(*c*) Per Sir J. Nicholl, in *Curling* v. *Thornton*, 2 Addams' Eccles. Rep. p. 17. [Wharton, § 585].
(*d*) *Stanley* v. *Bernes*, 3 Haggard. Eccles. pp. 393—465; *Moore* v. *Darell*, 4 ibid. 346, 354. [Per Lord Westbury in *Attorney-General* v. *Campbell*, L. R. 5 H. L. 529].

the effect of the instrument: *Locus regit actum.* Thus a testament of personal property, if executed according to the formalities required by the law of the place where it is made, and where the party making it was domiciled at the time of its execution, is valid in every other country, and is to be interpreted and given effect to according to the *lex loci.*

This principle, laid down by all the text-writers, was recently recognized in England in a case where a native of Scotland, domiciled in India, but who possessed heritable bonds in Scotland, as well as personal property there, and also in India, having executed a will in India, ineffectual to convey Scottish heritage; and a question having arisen whether his heir-at-law (who claimed the heritable bonds as heir) was also entitled to a share of the moveable property as legatee under the will. It was held by Lord Chancellor Brougham, in delivering the judgment of the House of Lords, affirming that of the Court below, that the construction of the will, and the legal consequences of that construction, must be determined by the law of the land where it was made, and where the testator had his domicile, that is to say, by the law of England prevailing in that country; and this, although the will was made the subject of judicial inquiry in the tribunals of Scotland; for these Courts also are bound to decide according to the law of the place where the will was made (*e*).

§ 83a. The *lex domicilii* only regulates universal successions. Change of domicile as to wills.

The law of the domicile only regulates *universal* assignments of moveable property, as on marriage or death, and because this is the only source from which a rule common to property situated in various countries can be derived. But when the title to a particular chattel is concerned, in a case not involving any universal assignment, the law of its situation is absolute (*f*). In England no change of domicile will avoid or affect a will which was valid by the law of the testator's domicile at the time of its execution (*g*). Some of the United States have adopted a different rule. Thus, in New York the law of the testator's last domicile is held to govern the will (*h*). The payment of succession duty is regulated by the *lex domicilii* (*i*).

(*e*) *Trotter* v. *Trotter*, 3 Wilson & Shaw, 407.

(*f*) [*Cammel* v. *Sewell*, 5 H. & N. 728. See as to powers of appointment respecting property in a foreign country, *Tatnall* v. *Hankey*, 2 Moo. P. C. 342]

(*g*) [24 & 25 Vict. c. 114, s. 3].

(*h*) [*Moultrie* v. *Hunt*, 23 N. Y. 394; Wharton, § 536a].

(*i*) [*Wallace* v. *Attorney-General*, L. R., 1 Ch. 1; *Attorney-General* v. *Campbell*, L. R. 5 H. L. 524; *In re Cigala's trust*, 7 Ch. D. 351].

§ 83b. Testamentary domicile of British subjects abroad and of foreigners in England.

It has been provided by Act of Parliament that whenever Her Majesty shall have entered into a convention with any foreign State for the purpose, no British subject resident at the time of his death in such foreign State, shall be deemed, under any circumstances, to have acquired a domicile there, unless the British subject shall have resided there for one year immediately preceding his death, and shall have made and deposited in a public office of such foreign country a declaration in writing of his intention to become domiciled in such foreign country. Without this declaration he shall be deemed, for all purposes of testate or intestate succession as to moveables, to retain the domicile he possessed at the time of going to reside in the foreign country (*k*). The converse case of foreigners, with whose country England has a convention, dying in England is provided for in the same way; that is, they are not to be deemed to have acquired a British domicile for testamentary purposes, except under the conditions stated (*l*). This Act does not apply to foreigners who have been naturalized in British dominions (*m*). It does not appear that any conventions have been made under this Act, and it has therefore been at present inoperative (*n*).

§ 83c. Wills of British subjects made abroad.

Another statute of the same year provides that, "Every will or other testamentary disposition made out of the United Kingdom by a British subject (whatever may be the domicile of such person at the time of making the same, or at the time of his or her death) shall, as regards personal estate, be deemed to be well executed for the purpose of being admitted in England and Ireland to probate, and in Scotland to confirmation, if the same be made according to the forms required, either by the law of the place where the same was made, or by the law of the place where such person was domiciled when the same was made, or by the laws then in force in that part of Her Majesty's dominions where he had his domicile of origin" (*o*). In 1874, Lacroix, a Frenchman by birth, but naturalized in England, made a will in Paris in the English form, relating to his property in England only. By the law of France, the will of a naturalized British subject made in France according to the forms required by the law of England, is valid in France, whatever may be the domicile of the testator at the time of his death, or at the time of making the will. The will of Lacroix was therefore admitted to probate under this statute, as being valid according to the law of the place where it was made (*p*). The same statute provides that "Every will or other testamentary instrument made within the United Kingdom by any British subject (whatever may be the domicile of such person at the time of making the same, or at the time of his or her death) shall, as regards personal estate, be held to be well executed, and shall be admitted in England and Ireland to probate, and in Scotland to confirmation, if the same be executed according to the forms required by the laws for the time being in force

Wills made in England.

(*k*) [24 & 25 Vict. c. 121, s. 1].
(*l*) [Ibid. s. 2].
(*m*) [Ibid. s. 3].
(*n*) [Williams on Executors, vol. ii. p. 1524 (7th ed.) note (*e*)].
(*o*) [24 & 25 Vict. c. 114, s. 1].
(*p*) [*In the goods of Lacroix*, 2 P. D. 95].

in that part of the United Kingdom where the same is made" (*q*). Under this section the will of an Italian who was naturalized in England, who made his will in England, and then returned to and was domiciled in Italy at the time of his death, was admitted to probate in England. The section was held to apply equally to native born as to naturalized British subjects (*r*).

§ 84. Personal *status.*

The sovereign power of municipal legislation also extends to the regulation of the personal rights of the citizens of the State, and to everything affecting their civil state and condition.

It extends (with certain exceptions) to the supreme police over all persons within the territory, whether citizens or not, and to all criminal offences committed by them within the same (*s*).

Some of these exceptions arise from the positive law of nations, others are the effect of special compact.

There are also certain cases where the municipal laws of the State, civil and criminal, operate beyond its territorial jurisdiction. These are,

I. Laws relating to the state and capacity of persons.

Laws relating to the state and capacity of persons may operate extra-territorially.

In general, the laws of the State, applicable to the civil condition and personal capacity of its citizens, operate upon them even when resident in a foreign country.

Such are those universal personal qualities which take effect either from birth, such as citizenship, legitimacy, and illegitimacy; at a fixed time after birth, as minority and majority; or at an indeterminate time after birth, as idiocy and lunacy, bankruptcy, marriage, and divorce, ascertained by the judgment of a competent tribunal. The laws of the State affecting all these personal qualities of its subjects travel with them wherever they go, and attach to them in whatever country they are resident (*t*).

(*q*) [24 & 25 Vict. c. 114, s. 2].

(*r*) [*In the goods of Gally*, 1 P. D. 438].

(*s*) "Leges cujusque imperii vim habent intra terminos ejusdem reipublicæ, omnesque ei subjectos obligant, nec ultra. Pro subjectis imperio habendi sunt omnes, qui intra terminos ejusdem reperiuntur, sive in perpetuum, sive ad tempus ibi commorentur." Huberus, tom. ii. liv. i. tit. 3, de Conflict. Leg. § 2.

(*t*) Pardessus, Droit Commercial, Pt. VI. tit. 7, ch. 2, § 1. Fœlix, Droit International Privé, liv. i. tit. i. § 31. "Qualitates personales certo loco alicui jure impressas, ubique circumferri et personam comitari, cum hoc effectu, ut ubivis locorum eo jure, quo tales personæ alibi gaudent vel subjecti sunt, fruantur et subjiciantur." Huberus, tom. ii, l. i. tit, 3, de Conflict. Leg. § 12,

This general rule is, however, subject to the following exceptions:

§ 85. Naturalization.

1. To the right of every independent sovereign State to naturalize foreigners and to confer upon them the privileges of their acquired domicile.

Even supposing a natural-born subject of one country cannot throw off his primitive allegiance, so as to cease to be responsible for criminal acts against his native country, it has been determined, both in Great Britain and the United States, that he may become by residence and naturalization in a foreign State entitled to all the commercial privileges of his acquired domicile and citizenship. Thus by the treaty of 1794, between the United States and Great Britain, the trade to the countries beyond the Cape of Good Hope, within the limits of the East India Company's Charter, was opened to American citizens, whilst it still continued prohibited to British subjects: it was held by the Court of King's Bench that a natural-born British subject might become a citizen of the United States, and be entitled to all the advantages of trade conceded between his native country and that foreign country; and that the circumstance of his returning to his native country for a mere temporary purpose would not deprive him of those advantages (*u*).

§ 86. Regulation of property situated in a State.

2. The sovereign right of every independent State to regulate the property within its territory constitutes another exception to the rule.

Thus, the personal capacity to contract a marriage, as to age, consent of parents, &c., is regulated by the law of the State of which the party is a subject; but the effects of a nuptial contract upon real property (*immobilia*) in another State are determined by the *lex loci rei sitæ*. Huberus, indeed, lays down the contrary doctrine, upon the ground that the foreign law, in this case, does not affect the territory immediately, but only in an incidental manner, and that by the implied consent of the sovereign, for the benefit of his subjects, without prejudicing his or their rights. But the practice of nations is certainly different, and therefore no such consent can be implied to waive the local law which has impressed

(*u*) *Wilson* v. *Marryatt*, 1 Bos. & Pull. 43; 7 T. R. 31. [See further on this subject at the end of the chapter].

certain indelible qualities upon immoveable property, within the territorial jurisdiction (*x*).

§ 87. Personal property.

As to personal property (*mobilia*) the *lex loci contractûs* or *lex domicilii* may, in certain cases, prevail over that of the place where the property is situated. Huberus holds that not only the marriage contract itself, duly celebrated in a given place, is valid in all other places, but that the rights and effects of the contract, as depending upon the *lex loci*, are to be equally in force everywhere (*y*). If this rule be confined to personal property, it may be considered as confirmed by the unanimous authority of the public jurists, who unite in maintaining the doctrine that the incidents and effects of the marriage upon the property of the parties, wherever situated, are to be governed by the law of the matrimonial domicile, in the absence of any other positive nuptial contract (*z*). But if there be an express ante-nuptial contract, the rights of the parties under it are to be governed by the *lex loci contractûs* (*a*).

§ 87a. Matrimonial domicile.

The matrimonial domicile has been defined to be the domicile first established by the husband and wife together; or, if none such be established, it is that of the husband at the time of the marriage (*b*). "The marriage contract," said Lord Brougham, "is emphatically one which parties make with an immediate view to the usual place of their residence" (*c*). The matrimonial domicile is not changed by an abandonment of one party by the other (*d*). It seems firmly established that the law of the matrimonial domicile will always govern personal property acquired before marriage (*e*); and instruments relating to it, such as marriage-settlements, are to be construed according to that law (*f*). But when the matrimonial domicile is changed after marriage, there is a difference of opinion as to what effect this will have

(*x*) Kent, Comment. vol. ii. pp. 182, 186 n. (5th edit.).

(*y*) "Porro, non tantum ipsi contractus ipsæque nuptiæ, certis locis ritè celebratæ, ubique pro justis et validis habentur; sed etiam jura et effecta contractuum nuptiarumque, in iis locis recepta, ubique vim suam obtinebunt." Huberus, l. i. tit. 3, de Conflict. Leg. § 9.

(*z*) Fœlix, § 66. [Westlake, § 366. Field, International Code, § 575.]

(*a*) *De Couche* v. *Savetier*, 3 Johnson, Ch. Rep. 211.

(*b*) [Field, International Code, § 577 (2nd ed.). Story, Conflict of Laws, § 193. Wharton, § 190].

(*c*) [*Warrender* v. *Warrender*, 2 Cl. & Fin. 488].

(*d*) [*Bonati* v. *Welsh*, 24 New York, 157. See *Le Sueur* v. *Le Sueur*, 1 P. D. 139].

(*e*) [Phillimore, vol. iv. § 445. *Watts* v. *Schrimpton*, 21 Beavan, 97; *Wright's Trusts*, 2 K. & J. 595. Westlake, § 366].

(*f*) [*Anstruther* v. *Adair*, 2 Mylne & K. 513; *Este* v. *Smith*, 18 Beavan, 112; *Saul* v. *His Creditors*, 5 Martin, N. S. 569; *De Lanc* v. *Moore*, 14 Howard, 253; *Collins* v. *Hector*, L. R. 19 Eq. 334.]

upon personal property acquired after such change of domicile. Story lays it down that when there has been a change, the law of the actual, and not of matrimonial, domicile will govern as to all future acquisitions of personal property, if the laws of the place where the rights are sought to be enforced do not prohibit such arrangements (*g*). On the other hand, the French Court of Cassation decided, in 1854, that the rights of the parties were, in such a case, governed by the law of the original matrimonial domicile (*h*).

§ 88. Effect of bankrupt discharge and title of assignees in another country.

By the general international law of Europe and America, a certificate of discharge obtained by a bankrupt in the country of which he is a subject, and where the contract was made and the parties domiciled is valid to discharge the debtor in every other country; but the opinions of jurists and the practice of nations have been much divided upon the question, how far the title of his assignees or syndics will control his personal property situated in a foreign country, and prevent its being attached and distributed under the local laws in a different course from that prescribed by the bankrupt code of his own country. According to the law of most European countries, the proceeding which is commenced in the country of the bankrupt's domicile draws to itself the exclusive right to take and distribute the property. The rule thus established is rested upon the general principle that personal (or moveable) property is, by a legal fiction, considered as situated in the country where the bankrupt had his domicile. But the principles of jurisprudence, as adopted in the United States, consider the *lex loci rei sitæ* as prevailing over the *lex domicilii* in respect to creditors, and that the laws of other States cannot be permitted to have an extra-territorial operation to the prejudice of the authority, rights, and interests of the State where the property lies. The Supreme Court of the United States has therefore determined, that both the government under its prerogative priority, and private creditors attaching under the local laws, are to be preferred to the claim of the assignees for the benefit of the general creditors under a foreign bankrupt law, although the debtor was domiciled and the contract made in a foreign country (*i*).

(*g*) [Conflict of Laws, § 187. Burge, Col. and For. Laws, pt. i. ch. 7, § 8. Wharton, § 198]

(*h*) [Felix, p. 91. This is approved of by Sir R. Phillimore, vol. iv. § 447].

(*i*) Bell's Commentaries on the Law of Scotland, vol. ii. pp. 681—687.

§ 89. The *lex loci contractus* often causes exceptions to this rule.

3. The general rule as to the application of personal statutes yields in some cases to the operation of the *lex loci contractus*.

Thus a bankrupt's certificate under the laws of his own country cannot operate in another State, to discharge him from his debts contracted with foreigners in a foreign country (*k*). And though the personal capacity to enter into the nuptial contract as to age, consent of parents, and prohibited degrees of affinity, &c., is generally to be governed by the law of the State of which the party is a subject, the marriage ceremony is always regulated by the law of the place where it is celebrated; and if valid there, it is considered as valid everywhere else, unless made in fraud of the laws of the country of which the parties are domiciled subjects.

§ 90. *Lex loci contractus.*

II. The municipal laws of the State may also operate beyond its territorial jurisdiction, where a contract made within the territory comes either directly or incidentally in question in the judicial tribunals of a foreign State.

A contract, valid by the law of the place where it is made, is, generally speaking, valid everywhere else. The general comity and mutual convenience of nations have established the rule, that the law of that place governs in every thing respecting the form, interpretation, obligation, and effect of the contract, wherever the authority, rights, and interests of other States and their citizens are not thereby prejudiced (*l*).

§ 91. Exceptions to its operation.

This qualification of the rule suggests the exceptions which arise to its application. And,

1. It cannot apply to cases properly governed by the *lex loci rei sitæ* (as in the case, before put, of the effect of a nuptial contract upon real property in a foreign State), or by the laws of another State relating to the personal state and capacity of its citizens.

Rose's Cases in Bankruptcy, vol. i. p. 462. Kent's Comment. vol. ii. pp. 393, 404—408, 459 (5th edit.). *Harrison* v. *Sterry*, 5 Cranch, 289; *Ogden* v. *Saunders*, 12 Wheaton, 153. [Westlake, ch. ix. Story, §§ 403—415].

(*k*) [*Phillips* v. *Allen*, 8 B. & C. 477].

(*l*) "Rectores imperiorum id comiter agunt, ut jura cujusque populi intra terminos ejus exercita, teneant ubique suam vim, quatenus nihil potestati aut juri alterius imperantis ejusque civium præjudicitur." Huberus, l. i. tit. 3, de Conflict. Leg. § 2. "Effecta contractuum, certo loco initorum, pro jure loci illius alibi quoque observantur, si nullum inde civibus alienis creetur præjudicium, in jure sibi quæsito." Ibid. § 11. [*Don* v. *Lippman*, 5 Cl. & Fin. 1; *Fergusson* v. *Fyffe*, 8 ibid. 121; *P. & O. Steam Navigation Co.* v. *Shand*, 3 Moo. P. C. N. S. 372. Forsyth, Cases and Opinions, 239].

2. It cannot apply where it would injuriously conflict with the laws of another State relating to its police, its public health, its commerce, its revenue, and generally its sovereign authority, and the rights and interests of its citizens.

Thus, if goods are sold in a place where they are not prohibited, to be delivered in a place where they are prohibited, although the trade is perfectly lawful by the *lex loci contractus*, the price cannot be recovered in the State where the goods are deliverable, because to enforce the contract there would be to sanction a breach of its own commercial laws. But the tribunals of one country do not take notice of, or enforce, either directly or incidentally, the laws of trade or revenue of another State, and therefore an insurance of prohibited trade may be enforced in the tribunals of any other country than that where it is prohibited by the local laws (*m*).

§ 92 Foreign marriages.

Huberus holds that the contract of marriage is to be governed by the law of the place where it is celebrated, excepting fraudulent evasions of the law of the State to which the party is subject (*n*). Such are marriages contracted in a foreign State, and according to its laws, by persons who are minors, or otherwise incapable of contracting, by the law of their own country. But according to the international marriage law of the British Empire, a clandestine marriage in Scotland, of parties originally domiciled in England, who resort to Scotland, for the sole purpose of evading the English marriage act, requiring the consent of parents or guardians,

English law.

(*m*) Pardessus, Droit Commercial, pt. vi. tit. 7, ch. 2, § 3. Emerigon, Traité d'Assurance, tom. i. pp. 212—215. Park on Insurance, p. 341, 6th ed. The moral equity of this rule has been strongly questioned by Bynkershoek and Pothier. [Also by Story, § 257. Westlake, § 149. Heffter, § 36; but it is admitted to be correct.]

(*n*) "Si licitum est, eo loco ubi contractum et celebratum est, ubique validum erit, effectumque habebit, sub eâdem exceptione, prejudicii aliis non creandi." Huberus, De Conflict. Leg. l. i. tit. 3, § 8. He puts, as an example of this exception, the case of parties going into another country, merely to evade the law of their own, as to majority and guardianship. "Sæpe fit, adolescentes sub curatoribus agentes, furtivos amores nuptiis conglutinare cupientes, abeant in Frisiam Orientalem, aliave loca, in quibus curatorum consensus ad matrimonium non requiritur, juxta leges Romanas, quæ apud nos hâc parte cessant. Celebrant ibi matrimonium, et mox redeunt in patriam. Ego ita existimo, hanc rem manifeste pertinere ad eversionem juris nostri; et ideo non esse magistratûs, huic obligatos è jure gentium, ejusmodi nuptias agnoscere et ratas habere. Multoque magis statuendum est, eos contra jus gentium facere videri, qui civibus alieni imperii suâ facilitate, jus patriis legibus contrarium, scientes, volentes, impertiuntur." De Conflict. Leg. Idem.

is considered valid in the English Ecclesiastical Courts. This jurisprudence is said to have been adopted upon the ground of its being a part of the general law and practice of Christendom, and that infinite confusion and mischief would ensue, with respect to legitimacy, succession, and other personal and proprietary rights, if the validity of the marriage contract was not determined by the law of the place where it was made. The same principle has been recognized between the different States of the American Union, upon similar grounds of public policy (*o*).

French law.

On the other hand, the age of consent required by the French Civil Code is considered, by the law of France, as a personal quality of French subjects, following them wherever they remove; and, consequently, a marriage by a Frenchman, within the required age, will not be regarded as valid by the French tribunals, though the parties may have been above the age required by the law of the place where it was contracted (*p*).

§ 93. Execution of contract in another country.

3. Wherever, from the nature of the contract itself, or the law of the place where it is made, or the expressed intention of the parties, the contract is to be executed in another country, everything which concerns its execution is to be determined by the law of that country. Those writers who affirm that this exception extends to everything respecting the nature, the validity, and the interpretation, appear to have erred in supposing that the authorities are at variance on this question. They will be found, on a critical examination, to establish the distinction between what relates to the validity and interpretation, and what relates to the execution of the contract. By the usage of nations, the former is to be determined by the *lex loci contractus*, the latter by the law of the place where it is to be carried into execution (*q*).

§ 93a. The law of the domicile regulates the

"There can be no doubt," said Lord Campbell, "of the general rule that a foreign marriage, valid according to the law of a country where it is celebrated, is good everywhere. But while the forms of entering into the contract of marriage are to be regulated by the *lex loci contractus*,

(*o*) Haggard's Consist. Rep. vol. ii. pp. 428—433. Kent's Commentaries, vol. ii, p. 93.

(*p*) Merlin, Répertoire, tit. *Loi*, § 6. Toullier, Droit Français, tom. i. No. 118, 576. [*Simonin* v. *Mallac*, 2 Swa. & Tr. 62].

(*q*) [Fœlix, Droit International Privé, § 74].

capacity of the parties to marry.

the law of the country in which it is celebrated, the essentials of the contract depend upon the *lex domicilii*, the law of the country in which the parties are domiciled at the time of the marriage, and in which the matrimonial residence is contemplated. Although the forms of celebrating the foreign marriage may be different from those required by the law of the country of domicile, the marriage may be good everywhere. But if the contract of marriage is such, in essentials, as to be contrary to the law of the country of domicile, and it is declared void by that law, it is to be regarded as void in the country of domicile, though not contrary to the law of the country in which it was celebrated" (*r*). It is quite obvious that no civilized State can allow its subjects or citizens, by making a temporary visit to a foreign country to enter into a contract, to be performed in the place of domicile, if the contract is forbidden by the law of the place of domicile as contrary to religion, or morality, or any of its fundamental institutions.

Brook v. *Brook.*

In 1840, W. L. Brook married Charlotte Armitage in England. In 1847, Mrs. Brook died, and in 1850 W. L. Brook married Emily Armitage, the lawful sister of his deceased wife, at Wandsbeck, in Denmark, according to the laws of Denmark. At the time of the marriage Brook and Emily Armitage were domiciled in England, and had merely gone to Denmark on a temporary visit. The question arose whether this marriage could be recognized as valid in England. The law of Denmark does not prohibit the marriage of a widower with his deceased wife's sister, but the law of England does (*s*). The House of Lords held that the parties, being at the time domiciled in England, their capacity to marry, and the consequent validity of their marriage, was to be decided by English law. "A marriage between a man and the sister of his deceased wife," said Lord Campbell, "being Danish subjects domiciled in Denmark, may be good all over the world, and this might likewise be so even if they were native born English subjects, who had abandoned their English domicile and were domiciled in Denmark. But I am by no means prepared to say that the marriage now in question ought to be, or would be, held valid in the Danish courts, proof being given that the parties were British subjects domiciled in England, that England was to be their matrimonial residence, and that by the law of England such a marriage is prohibited as being contrary to the law of God" (*t*). Every State has a perfect right to decide what marriages it will deem *contra bonos mores*, and what marriages it will prohibit within its jurisdiction. If such marriages are entered into abroad by its domiciled subjects, their validity will not be recognized in the State prohibiting them.

§ 93b. Polygamous and incestuous marriages.

When a marriage is polygamous or incestuous by the law of the place where it is drawn in question, its validity will not be recognized in such place, although the marriage may have been lawful where celebrated. There can be no question as to what is a polygamous marriage. Marriage, as understood in Christendom, has been defined

(*r*) [*Brook* v. *Brook*, 9 H. of L. Cas. 207; *Sottomayor* v. *De Barros*, 3 P. D. 1. See also, *Simonin* v. *Mallac*, 2 Sw. & Tr. 67].

(*s*) [*Hill* v. *Good*, Vaughan, 302; *R.* v. *Chadwick*, 11 Q. B. 173, 205].

(*t*) [*Brook* v. *Brook*, 9 H. of L. Cas. 212].

to be the voluntary union for life of one man and one woman, to the exclusion of all others (*u*). In 1866, Lord Penzance refused to recognize a Mormon marriage as valid in England. The marriage was a species of compact entered into between the parties in Utah, but it was such that the law of England could not take notice of it, so as to decree a restitution of conjugal rights (*x*). But what amounts to an incestuous marriage is by no means so clear. Marriages between blood relations in the lineal ascending or descending line, and marriages between brother and sister in the collateral line, whether of the whole or of the half-blood, are universally regarded as incestuous (*y*). Beyond this there is no rule upon which nations are agreed.

§ 93c. Clandestine Scotch marriages.

As regards clandestine Scotch marriages, it is now enacted that "no irregular marriage contracted in Scotland by declaration, acknowledgment, or ceremony, shall be valid, unless one of the parties had at the date thereof his or her usual place of residence there, or had lived in Scotland twenty-one days next preceding such marriage (*z*).

§ 94. *Lex fori.*

4. As every sovereign State has the exclusive right of regulating the proceedings in its own courts of justice, the *lex loci contractus* of another country cannot apply to such cases as are properly to be determined by the *lex fori* of that State where the contract is brought in question.

Thus, if a contract made in one country is attempted to be enforced, or comes incidentally in question, in the judicial tribunals of another, everything relating to the forms of proceeding, the rules of evidence, and of limitation, (or prescription,) is to be determined by the law of the State where the suit is pending, not of that where the contract is made (*a*).

§ 95. Foreign sovereign, his ambassador, army, or fleet, within the territory of another State.

III. The municipal institutions of a State may also operate beyond the limits of its territorial jurisdiction, in the following cases:—

1. The person of a foreign sovereign, going into the territory of another State, is, by the general usage and comity of nations, exempt from the ordinary local jurisdiction. Representing the power, dignity, and all the sovereign attributes of his own nation, and going into the territory of another State, under the permission which (in time of peace) is implied from

(*u*) [*Hyde* v. *Hyde*, L. R. 1 P. & D. 130].
(*x*) [Ibid.].
(*y*) [Story, Conflict of Laws, § 114. As to the marriage laws of the British Empire, see Report of Royal Commission on the Marriage Laws, 1868].
(*z*) [19 & 20 Vict. c. 96. *Lawford* v. *Davies*, 47 L. J. P. D. and A. 38].
(*a*) Kent's Commentaries, vol. ii. p. 459 (5th ed.). Fœlix, Droit International Privé, § 76. [*Don* v. *Lippman*, 5 Cl. & F. 1].

the absence of any prohibition, he is not amenable to the civil or criminal jurisdiction of the country where he temporarily resides (*b*).

2. The person of an ambassador, or other public minister, whilst within the territory of the State to which he is delegated, is also exempt from the local jurisdiction. His residence is considered as a continued residence in his own country, and he retains his national character, unmixed with that of the country where he locally resides (*c*).

3. A foreign army or fleet, marching through, sailing over, or stationed in the territory of another State, with whom the foreign sovereign to whom they belong is in amity, are also, in like manner, exempt from the civil and criminal jurisdiction of the place (*d*).

If there be no express prohibition, the ports of a friendly State are considered as open to the public armed and commissioned ships belonging to another nation, with whom that State is at peace. Such ships are exempt from the jurisdiction of the local tribunals and authorities, whether they enter the ports under the license implied from the absence of any prohibition, or under an express permission stipulated by treaty. But the private vessels of one State, entering the ports of another, are not exempt from the local jurisdiction, unless by express compact, and to the extent provided by such compact (*e*).

§ 96. The case of *The Exchange.*

The above principles, respecting the exemption of vessels belonging to a foreign nation from the local jurisdiction, were asserted by the Supreme Court of the United States, in the celebrated case of *The Exchange*, a vessel which had originally belonged to an American citizen, but had been seized and confiscated at St. Sebastien, in Spain, and converted into a public armed vessel by the Emperor Napoleon, in 1810, and was reclaimed by the original owner, on her arrival in the port of Philadelphia.

(*b*) Bynkershoek, de Foro Legat. cap. iii. § 13, cap. ix. § 10.

(*c*) Vide infra, pt. iii. ch. 1.

(*d*) "Exceptis tamen ducibus et generalibus, alicujus exercitûs, vel classis maritimæ, vel ductoribus etiam alicujus navis militaris, nam isti in suos milites, gentem, et naves, libere jurisdictionem sive voluntariam sive contentiosam, sive civilem, sive criminalem, quod occupant tanquam in suo proprio, exercere possunt," etc. Casaregis, Disc. 136, 174.

(*e*) [*United States* v. *Dickelman*, 2 Otto, 520].

In delivering the judgment of the Court in this case, Mr. Chief Justice Marshall stated that the jurisdiction of courts of justice was a branch of that possessed by the nation as an independent sovereign power. The jurisdiction of the nation, within its own territory, is necessarily exclusive and absolute. It is susceptible of no limitation not imposed by itself. Any restriction upon it, deriving validity from an external source, would imply a diminution of its sovereignty to the extent of the restriction, and an investment of that sovereignty, to the same extent, in that power which could impose such restriction.

All exceptions, therefore, to the full and complete power of a nation, within its own territories, must be traced up to the consent of the nation itself. They could flow from no other legitimate source.

This consent might be either express or implied. In the latter case it is less determinate, exposed more to the uncertainties of construction; but, if understood, not less obligatory.

The world being composed of distinct sovereignties, possessing equal rights and equal independence, whose mutual benefit is promoted by intercourse with each other, and by an interchange of those good offices which humanity dictates and its wants require, all sovereigns have consented to a relaxation in practice, under certain peculiar circumstances, of that absolute and complete jurisdiction, within their respective territories, which sovereignty confers.

This consent might, in some instances, be tested by common usage, and by common opinion growing out of that usage. A nation would justly be considered as violating its faith, although that faith might not be expressly plighted, which should suddenly, and without previous notice, exercise its territorial jurisdiction in a manner not consonant to the usages and received obligations of the civilized world.

This perfect equality and absolute independence of sovereigns, and this common interest impelling them to mutual intercourse, has given rise to a class of cases, in which every sovereign is understood to waive the exercise of a part of that complete, exclusive territorial jurisdiction, which has been stated to be the attribute of every nation.

§ 97. Exemption of the person of the foreign sovereign from the local jurisdiction.

1. One of these was the exemption of the person of the sovereign from arrest or detention within a foreign territory.

If he enters that territory with the knowledge and license of its sovereign, that license, although containing no express stipulation exempting his person from arrest, was universally understood to imply such stipulation.

Why had the whole civilized world concurred in this construction? The answer could not be mistaken. A foreign sovereign was not understood as intending to subject himself to a jurisdiction incompatible with his dignity and the dignity of his nation, and it was to avoid this subjection that the license had been obtained. The character of the person to whom it was given, and the object for which it was granted, equally required that it should be construed to impart full security to the person who had obtained it. This security, however, need not be expressed; it was implied from the circumstances of the case.

Should one sovereign enter the territory of another, without the consent of that other, expressed or implied, it would present a question which did not appear to be perfectly settled, a decision of which was not necessary to any conclusion to which the court might come in the case under consideration. If he did not thereby expose himself to the territorial jurisdiction of the sovereign whose dominions he had entered, it would seem to be because all sovereigns impliedly engage not to avail themselves of a power over their equal, which a romantic confidence in their magnanimity had placed in their hands.

§ 98. Exemption of foreign ministers from the local jurisdiction.

2. A second case, standing on the same principles with the first, was the immunity which all civilized nations allow to foreign ministers.

Whatever might be the principle on which this immunity might be established, whether we consider the minister as in the place of the sovereign he represents, or by a political fiction suppose him to be extra-territorial, and, therefore, in point of law, not within the jurisdiction of the sovereign at whose court he resides; still the immunity itself is granted by the governing power of the nation to which the minister is deputed. This fiction of extra-territoriality could not be

erected and supported against the will of the sovereign of the territory. He is supposed to assent to it.

This consent is not expressed. It was true that in some countries, and in the United States among others, a special law is enacted for the case. But the law obviously proceeds on the idea of prescribing the punishment of an act previously unlawful, not of granting to a foreign minister a privilege which he would not otherwise possess. The assent of the local sovereign to the very important and extensive exemptions from territorial jurisdiction which are admitted to attach to foreign ministers, is implied from the consideration, that, without such exemptions, every sovereign would hazard his own dignity by employing a public minister abroad. His minister would owe temporary and local allegiance to a foreign prince, and would be less competent to the objects of his mission. A sovereign committing the interests of his nation with a foreign power to the care of a person whom he has selected for that purpose, cannot intend to subject his minister in any degree to that power; and, therefore, a consent to receive him implies a consent that he shall possess those privileges which his principal intended he should retain, privileges which are essential to the dignity of his sovereign, and to the duties he is bound to perform.

In what cases a public minister, by infracting the laws of the country in which he resides, may subject himself to other punishment than will be inflicted by his own sovereign, was an inquiry foreign to the present purpose. If his crimes be such as to render him amenable to the local jurisdiction, it must be because they forfeit the privileges annexed to his character; and the minister, by violating the conditions under which he was received as the representative of a foreign sovereign, has surrendered the immunities granted on those conditions; or, according to the true meaning of the original consent, has ceased to be entitled to them.

§ 99. Exemption from the local jurisdiction of foreign troops passing through the territory.

3. A third case, in which a sovereign is understood to cede a portion of his territorial jurisdiction, was where he allows the troops of a foreign prince to pass through his dominions.

In such case, without any express declaration waiving jurisdiction over the army to which this right of passage has

been granted, the sovereign who should attempt to exercise it would certainly be considered as violating his faith. By exercising it the purpose for which the free passage was granted would be defeated, and a portion of the military force of a foreign independent nation would be diverted from those national objects and duties to which it was applicable, and would be withdrawn from the control of the sovereign whose power and whose safety might greatly depend on retaining the exclusive command and disposition of this force. The grant of a free passage, therefore, implies a waiver of all jurisdiction over the troops during their passage, and permits the foreign general to use that discipline and to inflict those punishments which the government of his army may require.

But if, without such express permission, an army should be led through the territories of a foreign prince, might the territorial jurisdiction be rightfully exercised over the individuals composing that army?

Without doubt, a military force can never gain immunities of any other description than those which war gives, by entering a foreign territory against the will of its sovereign. But if his consent, instead of being expressed by a particular license, be expressed by a general declaration that foreign troops may pass through a specified tract of country, a distinction between such general permission and a particular license is not perceived. It would seem reasonable, that every immunity which would be conferred by a special license, would be, in like manner, conferred by such general permission.

It was obvious that the passage of an army through a foreign territory would probably be, at all times, inconvenient and injurious, and would often be imminently dangerous to the sovereign through whose dominions it passed. Such a passage would break down some of the most decisive distinctions between peace and war, and would reduce a nation to the necessity of resisting by war an act not absolutely hostile in its character, or of exposing itself to the stratagems and frauds of a power whose integrity might be doubted, and who might enter the country under deceitful pretexts. It is for reasons like those that the general license to foreigners to enter the dominions of a friendly power is never understood

to extend to a military force; and an army marching into the dominions of another sovereign, without his special permission, may justly be considered as committing an act of hostility; and, even if not opposed by force, acquires no privilege by its irregular and improper conduct. It might, however, well be questioned whether any other than the sovereign of the State is capable of deciding that such military commander is acting without a license.

§ 100. Exemption of foreign ships of war, entering the ports of any nation, under an express or implied permission.

But the rule which is applicable to armies did not appear to be equally applicable to ships of war entering the ports of a friendly power. The injury inseparable from the march of an army through an inhabited country, and the dangers often, indeed generally, attending it, do not ensue from admitting a ship of war, without special license, into a friendly port. A different rule, therefore, with respect to this species of military force, had been generally adopted. If, for reasons of State, the ports of a nation generally, or any particular ports be closed against vessels of war generally, or against the vessels of any particular nation, notice is usually given of such determination. If there be no prohibition, the ports of a friendly nation are considered as open to the public ships of all powers with whom it is at peace, and they are supposed to enter such ports, and to remain in them while allowed to remain, under the protection of the government of the place.

The treaties between civilized nations, in almost every instance, contain a stipulation to this effect in favour of vessels driven in by stress of weather or other urgent necessity. In such cases the sovereign is bound by compact to authorize foreign vessels to enter his ports, and this is a license which he is not at liberty to retract.

If there be no treaty applicable to the case, and the sovereign, from motives deemed adequate by himself, permits his ports to remain open to the public ships of foreign friendly powers, the conclusion seems irresistible that they enter by his assent. And if they enter by his assent necessarily implied, no just reason is perceived for distinguishing their case from that of vessels which enter by express assent.

The whole reasoning, upon which such exemption had been implied in the case of a sovereign or his minister, applies with

full force to the exemption of ships of war in the case in question.

"It is impossible to conceive," said Vattel, "that a prince who sends an ambassador, or any other minister, can have any intention of subjecting him to the authority of a foreign power; and this consideration furnishes an additional argument, which completely establishes the independence of a public minister. If it cannot be reasonably presumed that his sovereign means to subject him to the authority of the prince to whom he is sent, the latter, in receiving the minister, consents to admit him on the footing of independence; and thus there exists between the two princes a tacit convention, which gives a new force to the natural obligation" (*f*).

Equally impossible was it to conceive, that a prince who stipulates a passage for his troops, or an asylum for his ships of war in distress, should mean to subject his army or his navy to the jurisdiction of a foreign sovereign. And if this could not be presumed, the sovereign of the port must be considered as having conceded the privilege to the extent in which it must have been understood to be asked.

§ 101. Distinction between public and private vessels.

According to the judgment of the Supreme Court of the United States, where, without treaty, the ports of a nation are open to the public and private ships of a friendly power, whose subjects have also liberty, without special license, to enter the country for business or amusement, a clear distinction was to be drawn between the rights accorded to private individuals, or private trading vessels, and those accorded to public armed ships which constitute a part of the military force of the nation.

When private individuals of one nation spread themselves through another as business or caprice may direct, mingling indiscriminately with the inhabitants of that other; or when merchant vessels enter for the purposes of trade, it would be obviously inconvenient and dangerous to society, and would subject the laws to continual infraction, and the government to degradation, if such individuals did not owe temporary and local allegiance, and were not amenable to the jurisdiction of the country. Nor can the foreign sovereign have any motive

(*f*) Vattel, Droit des Gens, liv. 4, ch. 7, § 92.

for wishing such exemption. His subjects, then, passing into foreign countries, are not employed by him, nor are they engaged in national pursuits. Consequently there are powerful motives for not exempting persons of this description from the jurisdiction of the country in which they are found, and no motive for requiring it. The implied license, therefore, under which they enter, can never be construed to grant such exemption.

But the situation of a public armed ship was, in all respects, different. She constitutes a part of the military force of her nation, acts under the immediate and direct command of the sovereign, is employed by him in national objects. He has many and powerful motives for preventing those objects from being defeated by the interference of a foreign State. Such interference cannot take place without seriously affecting his power and his dignity. The implied license, therefore, under which such vessel enters a friendly port, may reasonably be construed, and it seemed to the Court ought to be construed, as containing an exemption from the jurisdiction of the sovereign, within whose territory she claims the rites of hospitality.

Upon these principles, by the unanimous consent of nations, a foreigner is amenable to the laws of the place; but certainly, in practice, nations had not yet asserted their jurisdiction over the public armed ships of a foreign sovereign, entering a port open for their reception.

Bynkershoek, a public jurist of great reputation, had indeed maintained that the property of a foreign sovereign was not distinguishable, by any legal exemption, from the property of an ordinary individual; and had quoted several cases in which courts of justice had exercised jurisdiction over cases in which a foreign sovereign was made a party defendant (*g*).

Without indicating any opinion on this question, it might safely be affirmed, that there is a manifest distinction between the private property of a person who happens to be a prince and that military force which supports the sovereign power, and maintains the dignity and independence of a nation. A prince, by acquiring private property in a foreign country,

(*g*) Bynkershoek, de Foro Legat. cap. i.

may possibly be considered as subjecting that property to the territorial jurisdiction; he may be considered as, so far, laying down the prince and assuming the character of a private individual (*h*); but he cannot be presumed to do this with respect to any portion of that armed force which upholds his crown and the nation he is intrusted to govern.

The only applicable case cited by Bynkershock was that of the Spanish ships of war, seized in 1668, in Flushing, for a debt due from the King of Spain. In that case the States-General interposed; and there is reason to believe, from the manner in which the transaction is stated, that either by the interference of government, or by the decision of the tribunal, the vessels were released (*i*).

This case of the Spanish vessels was believed to be the only case furnished by the history of the world, of an attempt made by an individual to assert a claim against a foreign prince, by seizing the armed vessels of the nation. That this proceeding was at once arrested by the government, in a nation which appears to have asserted the power of proceeding against the private property of the prince, would seem to furnish no feeble argument in support of the universality of the opinion in favour of the exemption claimed for ships of war. The distinction made in the laws of the United States between public and private ships, would appear to proceed from the same opinion.

Without doubt, the sovereign of the place is capable of destroying this implication. He may claim and exercise jurisdiction, either by employing force, or by subjecting such vessels to the ordinary tribunals. But until such power be exerted in a manner not to be misunderstood, the sovereign cannot be considered as having imparted to the ordinary tribunals a jurisdiction which it would be a breach of faith to

(*h*) [This point was decided in accordance with the text in *The Charkieh*, L. R. 4 A. & E. 87]

(*i*) "Anno 1668, privati quidam Regis Hispanici creditores, tres ejus regni naves bellicas, quæ portum Flissingensem subiverant, arresto detinuerunt, ut inde ipsis satisfieret, Rege Hispanico ad certum diem per epistolam in jus vocato ad judices Flissingenses, sed ad legati Hispanici expostulationes Ordines Generales, 12 Dec. 1668, decreverunt, Zelandiæ Ordines curare vellent, naves illæ continuò demitterentur liberæ, admoneretur tamen per literas Hispaniæ Regina, ipsa curare vellet, ut illis creditoribus, in causâ justissimâ, satisfieret, ne repressalias, quas imploraverunt, largiri tenerentur.' Bynkershock, cap. iv.

exercise. Those general statutory provisions, therefore, which are descriptive of the ordinary jurisdiction of the judicial tribunals, which give an individual, whose property has been wrested from him, a right to claim that property in the courts of the country in which it is found, ought not, in the opinion of the Supreme Court, to be so construed as to give them jurisdiction in a case in which the sovereign power had implicitly consented to waive its jurisdiction.

The Court came to the conclusion, that the vessel in question being a public armed ship, in the service of a foreign sovereign with whom the United States were at peace, and having entered an American port open for her reception, on the terms on which ships of war are generally permitted to enter the ports of a friendly power, must be considered as having come into the American territory under an implied promise that, while necessarily within it and demeaning herself in a friendly manner, she should be exempt from the jurisdiction of the country (*k*).

§ 101a. Proceedings against ships of war.

The point actually decided in the case of *The Exchange* was, that the local court would not inquire into the title by which the foreign sovereign held his vessel; but it did not follow from this that ships of war were to be exempt from the jurisdiction in all cases when complying with the terms of the implied license under which they entered the friendly port. Englishmen and Americans cannot, without the consent of the government, proceed against the ships of war of their own country (*l*); but it was not until lately perfectly clear that they were debarred from suing those of another State, to enforce a maritime lien, such as salvage or damage (*m*). "It may be laid down," said Mr. Justice Story, "as a general proposition, that all persons and property within the territorial jurisdiction of a sovereign are amenable to the jurisdiction of himself or his courts; and that the exceptions to this rule are such only as by common usage, and public policy, have been allowed in order to preserve the peace and harmony of nations, and to regulate their intercourse in a manner best suited to their dignity and rights" (*n*). But it is now settled that a ship of war and its cargo, even though the cargo belongs to private persons, is an exception to this rule (*o*).

Exemption of public ships rests on grounds of policy.

§ 101b. Suits against foreign sovereigns.

It is clear that no suit can be maintained against a foreign sovereign for acts done by him in virtue of his authority as sovereign, and in

(*k*) *The Schooner Exchange* v. *McFadden and others*, 7 Cranch, 135—147.

(*l*) [*The Comus*, 2 Dods. Ad. 464; *Briggs* v. *The Light Boats*, 11 Allen (Mass. Rep.), 157].

(*m*) [*The Prins Frederick*, 2 Dods. Ad. 451; *U. S.* v. *Wilder*, 3 Sumner, 308; *The Charkieh*, L. R. 4 A. & E. 93. S. C. L. R. 8 Q. B. 200. Report of Royal Commission on Fugitive Slaves, 1875, pp. 44, 77.]

(*n*) [*The Santissima Trinidad*, 7 Wheaton, 353].

(*o*) [*The Constitution*, 48 L. J. P. D. & A. 13.]

England this has been held to be the case, even though the foreign sovereign is also a British subject (*o*). But the total exemption of the property of a foreign sovereign situate within the local jurisdiction, even though it consist of ships of war, cannot be considered as entirely established. The tendency of international law is to protect such property in all cases where any dealings with it would impair the dignity of the foreign sovereign, and to substitute negotiations between governments for proceedings in the local courts in such cases. If, however, a suit should be instituted relating to his property, which in no way affects his dignity, there seems no objection to the foreign sovereign being sued, and his property dealt with, in the ordinary way (*p*).

Dignity of States to be maintained.

§ 101c. Suits by foreign sovereigns.

If a foreign sovereign himself institutes a suit in the local court, he thereby submits to its jurisdiction as regards all matters relating to the suit (*q*); and therefore the Court may put him on terms, and order all proceedings to be stayed, unless he complies with its terms (*r*). Thus, the French courts would not allow the United States to sue certain shipbuilders for fitting out privateers for the Confederate States, until that Government had deposited 150,000 francs as security for costs (*s*). The rights of a foreign sovereign, as regards the public property of his State, do not abate by reason of a change in the person of the sovereign, and his successor may continue or institute a suit to enforce such rights (*t*).

§ 102. Law of France as to the exemption of private vessels from the local jurisdiction.

The maritime jurisprudence of France, in respect to foreign private vessels entering the French ports for the purposes of trade, appears to be inconsistent with the principles established in the above judgment of the Supreme Court of the United States; or, to speak more correctly, the legislation of France waives, in favour of such vessels, the exercise of the local jurisdiction to a greater extent than appears to be imperatively required by the general principles of international law. As it depends on the option of a nation to annex any conditions it thinks fit to the admission of foreign vessels, public or private, into its ports, so it may extend, to any degree it may think fit, the immunities to which such vessels, entering under an implied license, are entitled by the general law and usage of nations.

The law of France, in respect to offences and torts com-

(*o*) [*Duke of Brunswick* v. *King of Hanover*, 2 Cl. & F. 1].

(*p*) [*The Charkieh*, L. R. 4 A. & E. 97; *Gladstone* v. *Musurus Bey*, 1 H. & M. 492; 32 L. J. Ch. 155; *Larivière* v. *Morgan*, L. R. 7 H. L. 423].

(*q*) [*Hullet* v. *King of Spain*, 1 D. & Cl. 174].

(*r*) [*Priolcau* v. *U. S. of America*, L. R. 2 Eq. 659; *U. S.* v. *Wagner*, L. R. 2 Ch. 582; *Republic of Peru* v. *Weguelin*, L. R. 20 Eq. 140. Westlake, § 135. Fœlix, § 217].

(*s*) [Report of Neutrality Laws Commission, 1868, p. 49].

(*t*) [*The Sapphire*, 11 Wallace, 164; *King of Spain* v. *Oliver*, 2 Washington C. C. 431].

mitted on board foreign merchant vessels in French ports, establishes a twofold distinction between:

1. Acts of mere interior discipline of the vessel, or even crimes and offences committed by a person forming part of its officers and crew, against another person belonging to the same, where the peace of the port is not thereby disturbed.

2. Crimes and offences committed on board the vessel against persons not forming part of its officers and crew, or by any other than a person belonging to the same, or those committed by the officers and crew upon each other, if the peace of the port is thereby disturbed.

In respect to acts of the first class, the French tribunals decline taking jurisdiction. The French law declares that the rights of the power, to which the vessel belongs, should be respected, and that the local authority should not interfere, unless its aid is demanded. These acts, therefore, remain under the police and jurisdiction of the State to which the vessel belongs. In respect to those of the second class, the local jurisdiction is asserted by those tribunals. It is based on the principle, that the protection accorded to foreign merchantmen in the French ports cannot divest the territorial jurisdiction, so far as the interests of the State are affected; that a vessel admitted into a port of the State is of right subjected to the police regulations of the place; and that its crew are amenable to the tribunals of the country for offences committed on board of it against persons not belonging to the ship, as well as in actions for civil contracts entered into with them; that the territorial jurisdiction for this class of cases is undeniable.

It is on these principles that the French authorities and tribunals act, with regard to merchant ships lying within their waters. The grounds upon which the jurisdiction is declined in one class of cases, and asserted in the other, are stated in a decision of the Council of State, pronounced in 1806. This decision arose from a conflict of jurisdiction between the local authorities of France and the American consuls in the French ports, in the two following cases:

§ 103. The cases of the

The first case was that of the American merchant vessel, *The Newton*, in the port of Antwerp; where the American

Newton and the *Sally.*

consul and the local authorities both claimed exclusive jurisdiction over an assault committed by one of the seamen belonging to the crew against another, in the vessel's boat. The second was that of another American vessel, *The Sally*, in the port of Marseilles, where exclusive jurisdiction was claimed both by the local tribunals and by the American consul, as to a severe wound inflicted by the mate on one of the seamen, in the alleged exercise of discipline over the crew. The Council of State pronounced against the jurisdiction of the local tribunals and authorities in both cases, and assigned the following reasons for its decision:

"Considering that a neutral vessel cannot be indefinitely regarded as a neutral place, and that the protection granted to such vessels in the French ports cannot oust the territorial jurisdiction, so far as respects the public interests of the State; that, consequently, a neutral vessel admitted into the ports of the State is rightfully subject to the laws of the police of that place where she is received; that her officers and crew are also amenable to the tribunals of the country for offences and torts (*u*) committed by them, even on board the vessel, against other persons than those belonging to the same, as well as for civil contracts made with them; but that, in respect to offences and torts committed on board the vessel, by one of the officers and crew against another, the rights of the neutral power ought to be respected, as exclusively concerning the internal discipline of the vessel, in which the local authorities ought not to interfere, unless their protection is demanded, or the peace and tranquillity of the port is disturbed; the Council of State is of opinion that this distinction, indicated in the report of the Grand Judge, Minister of Justice, and conformable to usage, is the only rule proper to be adopted, in respect to this matter; and applying this doctrine to the two specific cases in which the consuls of the United States have claimed jurisdiction; considering that one of these cases was that of an assault committed in the boat of the American ship *Newton*, by one of the crew upon another, and the other case was that of a severe wound

(*u*) The term used in the original is *délits*, which includes every wrong done to the prejudice of individuals, whether they be *délits publics* or *délits privés*.

inflicted by the mate of the American ship *Sally* upon one of the seamen, for having made use of the boat without leave; is of opinion that the jurisdiction claimed by the American consuls ought to be allowed, and the French tribunals prohibited from taking cognizance of these cases" (*x*).

§ 103a. Distinction between public and private ships.

Mr. Wheaton, in a notice of Ortolan's work, came to the conclusion that the French law established the true rule, and was most in conformity with the practice of nations (*y*). A ship of war and a private merchant vessel cannot both claim the same immunities. As has already been stated, it is doubtful whether a ship of war may not be proceeded against in some cases, but it is beyond doubt that merchant vessels are always liable to be sued in a local court. It is also a separate point how far a local court may exercise jurisdiction over acts done or persons found on board a public or a private ship.

§ 103b. Doctrine of exterritoriality.

It has been laid down by many writers that a ship of war is in all respects a portion of the territory of the State to which she belongs, and that when in the waters of another State not only is the vessel herself exempt from the local law, but the exemption extends to all persons and things on board her (*z*). Although this doctrine of exterritoriality has been very widely received, there is a great weight of authority against it.

§ 103c. Case of John Brown.

In the case of John Brown, a British subject, who was imprisoned by the Spaniards at Callao in 1819, for assisting in a Peruvian revolt, and who escaped on board a British ship of war then in the port of Lima, Lord Stowell on being asked his opinion as to whether Brown ought to have been delivered up to the Spanish authorities, replied "that individuals merely belonging to the same country with the ship of war, are exempted from the civil and criminal process of the country in its ordinary jurisdiction of justice by getting on board such ship, and claiming what is called the protection of its flag, is a pretension which, however heard of in practice occasionally has no existence whatever in principle" (*a*). In accordance with this opinion Lord Castlereagh directed the English minister in Spain to disavow the act of the captain of the ship of war in not delivering up John Brown.

§ 103d. Opinion of the U.S. Attorney-General.

In 1794, the opinion of Mr. William Bradford, the United States Attorney-General was taken, as to whether a writ of *habeas corpus* would go to bring up a subject illegally detained on board a foreign ship of war. He replied that although he could find no instance of this having been done, he was of opinion that a writ might be legally awarded in such

(*x*) Ortolan, Règles Internationales de la Mer, tome i. pp. 293—298. Appendice, Annexe H. p. 441.

(*y*) [Revue de Droit Français et Étranger, vol. ii. p. 206. Wheaton, by Lawrence, p. 191].

(*z*) [Historicus, *Times*, Nov. 4th, 1875. Italy and Germany maintain this exterritoriality. See Report of Royal Commission on Fugitive Slaves, 1876, p. 7, where the subject is fully discussed. This Report is a most valuable contribution to international law, and well repays the most careful reading].

(*a*) [Report of Royal Commission on Fugitive Slaves, 1876, p. 77].

a case, and that the commander of the foreign ship of war could not claim to be exempt from the jurisdiction of the State where he happens to be (*b*).

§ 103e. Opinion of Cockburn, C.J., on the exemption of public

Lord Chief Justice Cockburn, in criticising the case of the *Exchange*, allows the exemption of a ship of war "if restricted to the ship itself, which was all the court had to deal with." But as regards those on board, his Lordship adds, that "inasmuch as the crew may commit offences against the local law, which the ship, being an inanimate thing, cannot, it cannot be equally implied that the local sovereign has consented that if they violate the local law they shall enjoy immunity from its penalties." It is admitted that they are liable to be arrested for offences against the local law committed on shore, why therefore "should they be exempt because they get back to the ship before they are taken? And *à fortiori*, why should a person living under the local law, as a subject of the local State, be able to withdraw himself from the operation of that law by getting on a ship which, but for this alleged exterritoriality, would clearly be within the jurisdiction? Is it necessarily to be implied that, because by the comity of nations the ports of every State are open to the ships of war of other States, the local sovereign has assented to his law becoming powerless in respect of crime committed within its jurisdiction in case the criminal can get on board a foreign ship lying in its waters? Has this country ever assented to this doctrine? Is it prepared to do so now? Can any instance be cited in which a criminal has been allowed to escape because he found his way to a foreign ship of war? Certainly none such has been brought to our knowledge."

Rule laid down by Cockburn, C.J.

This opinion was delivered on the question as to what course an English naval commander was to pursue, when a slave escaped on to his vessel, while she was in the waters of a State that permitted slavery. After reviewing all the leading authorities on this subject, the Lord Chief Justice arrived at the conclusion that "The rule which reason and good sense would, as it strikes me, prescribe, would be that, as regards the discipline of a foreign ship of war, and offences committed on board, as between members of her crew towards one another, matters should be left entirely to the law of the ship, and that should the offender escape to the shore, he should, if taken, be given up to the commander of the ship on demand, and should be tried on shore only if no such demand be made. But if a crime be committed on board the ship upon a local subject, or if, a crime having been committed on shore, the criminal gets on board a foreign ship, he should be given up to the local authorities. In whatever way the rule should be settled, so important a principle of international law ought not to be permitted to remain in its present unsettled state" (*c*).

§ 103f. Criminals and fugitive slaves.

There is, no doubt, a distinction between a criminal going on board a ship of war, and a slave escaping to it from his master. Nevertheless, from an international point of view, to protect either is a violation of the rights of the local sovereign. The law of England, as is shown

(*b*) [Opinions of Attorneys-General, vol. i. p. 25. See also, ibid., pp. 27, 54, 56. U. S. Papers on Foreign Affairs, vol. i. p. 446].

(*c*) [Report of Royal Commission on Fugitive Slaves, 1876, pp. 37, 43].

further on, recognises the existence of slavery in some countries, and consequently the rights of slave-owners in such countries must be respected. To assert that a slave, by coming on board a ship of war while she is in the waters of a slave-owning State immediately becomes a free man, is equivalent to asserting that a slave-owner's rights will not be regarded, and is tantamount to making the State to which the ship of war belongs, pass judgment on the laws of a foreign and independent State. The question cannot be confined even to criminals or slaves. England has abolished imprisonment for ordinary debt, but when her ships of war are in a State that incarcerates debtors, is a debtor to escape by going on board an English ship of war? No State would submit to such a pretension. But the case of a slave and a debtor are very similar, so far as the ship of war is concerned. Each claims the protection of its flag from a liability imposed by the local law, and it is not for the commander, by protecting either, virtually to decide whether the local law is a proper or an improper one.

§ 103g. Merchant vessels in foreign ports.

A merchant vessel is not in the same position as a ship of war. Every State claims to exercise jurisdiction over its own merchant vessels wherever they are, and even when they are in the waters of another State. But when in a foreign port they must also obey the laws of the country to which the port belongs (*d*). They are thus at the same time subject to two concurrent systems of law. Any State may decline to exercise jurisdiction over foreign merchant vessels in its harbours to whatever extent it pleases, as is the case with France; but the right nevertheless exists, and might be resumed on due notice being given. Thus, a claim by the local officers of France to board the ship, search her, and take out of her any one who has become amenable to the local laws, could not lawfully be resisted or disputed after such due notice (*e*).

§ 103h. Case of the *Creole*.

A peculiar case arose in 1841. The brig *Creole*, an American merchant vessel, sailed from a port in Virginia with 135 slaves on board. On the high seas some of the slaves rose, and took possession of the vessel, killing a passenger, and wounding the captain and several of the crew. They compelled the mate to navigate the ship to Nassau. On arrival there the local authorities, at the request of the American Consul, arrested such slaves as were proved to have committed acts of violence, and the rest escaped to the shore, but whether with connivance of the local authorities or not, did not appear. The United States demanded that those who had gained the shore should be restored, but this was refused by Great Britain, on the ground that they could not be seized while they had committed no crime within British jurisdiction. The matter was finally referred to an arbitrator, who awarded a pecuniary indemnity to the American owner for the loss of his slaves (*f*). The difficulty of this case arises from the fact that the *Creole* entered the

(*d*) [*R.* v. *Anderson*, L. R. 1 C. C. R. 161; *R.* v. *Sattler*, D. & B. C. C. 525; *R.* v. *Lesley*, 1 Bell, C. C. 220. Boyd, The Merchant Shipping Laws, p. 438]

(*e*) [Rep. on Fugitive Slaves, 1876, p. 26].

(*f*) [Report of Decisions of Commissions under Convention of 1853, p. 242. See also Wheaton, by Lawrence, p. 206; by Dana, p. 166. Hansard, Parl. Debates (Lords), vol. lx. p. 318].

port of Nassau under duress, and against the will of her owners and master. Yet it can hardly be maintained that even under such circumstances the local authorities were bound to try and prevent the slaves from going on shore. The ship was within British dominions, and the slaves, when trying to escape, violated no British law; but, on the contrary, were endeavouring to dissolve a tie looked upon with abhorrence by British law. The arrest of those who had committed acts of violence rested on a different ground. They were seized, not because they had endeavoured to regain their liberty, but because they had committed piratical acts (*g*).

§ 104. Exemption of public or private vessels from the local jurisdiction does not extend to justify acts of aggression against the security of the State.

Whatever may be the nature and extent of the exemption of the public or private vessels of one State from the local jurisdiction in the ports of another, it is evident that this exemption, whether express or implied, can never be construed to justify acts of hostility committed by such vessel, her officers, and crew, in violation of the law of nations, against the security of the State in whose ports she is received, or to exclude the local tribunals and authorities from resorting to such measures of self-defence as the security of the State may require.

This just and salutary principle was asserted by the French Court of Cassation, in 1832, in the case of the private Sardinian steam-vessel, *The Carlo Alberto*, which, after having landed on the southern coast of France the Duchess of Berry and several of her adherents, with the view of exciting civil war in that country, put into a French port in distress. The judgment of the Court, pronounced upon the *conclusions* of M. Dupin aîné, Procureur-Général, reversed the decision of the inferior tribunal, releasing the prisoners taken on board the vessel, upon the following grounds:

1. That the principle of the law of nations, according to which a foreign vessel, allied or neutral, is considered as forming part of the territory of the nation to which it belongs, and consequently is entitled to the privilege of the same inviolability with the territory itself, ceases to protect a vessel which commits acts of hostility in the French territory, inconsistent with its character of ally, or neutral; as if, for example, such vessel be chartered to serve as an instrument of conspiracy against the safety of the State, and after having landed some of the persons concerned in these acts, still

(*g*) [See Calvo, Droit International, vol. i. § 260].

continued to hover near the coast, with the rest of the conspirators on board, and at last puts into port under pretext of distress.

2. That supposing such allegation of distress be founded in fact, it could not serve as a plea to exclude the jurisdiction of the local tribunals, taking cognizance of a charge of high treason against the persons found on board, after the vessel was compelled to put into port by stress of weather (*h*).

§ 105. The exemption of public ships from the local jurisdiction does not extend to their prize goods taken in violation of the neutrality of the country into which they are brought.

So also it has been determined by the Supreme Court of the United States, that the exemption of foreign public ships, coming into the waters of a neutral State, from the local jurisdiction, does not extend to their prize ships, or goods captured by armaments fitted out in its ports, in violation of its neutrality, and of the laws enacted to enforce that neutrality.

Such was their judgment in the case of the Spanish ship *Santissima Trinidad*, from which the cargo had been taken out, on the high seas, by armed vessels commissioned by the United Provinces of the Rio de la Plata, and fitted out in the ports of the United States in violation of their neutrality. The tacit permission, in virtue of which the ships of war of a friendly power are exempt from the jurisdiction of the country, cannot be so interpreted as to authorize them to violate the rights of sovereignty of the State, by committing acts of hostility against other nations, with an armament supplied in the ports, where they seek an asylum. In conformity with this principle, the Court ordered restitution of the goods claimed by the Spanish owners, as wrongfully taken from them (*i*).

§ 106. Jurisdiction of the State over its public and private vessels on the high seas.

3. Both the public and private vessels of every nation, on the high seas, and out of the territorial limits of any other State, are subject to the jurisdiction of the State to which they belong (*k*).

Vattel says that the domain of a nation extends to all its just possessions; and by its possessions we are not to understand its territory only, but all the rights (*droits*) it enjoys.

(*h*) Sirey, Recueil général de Jurisprudence, tome xxxii. Partie i. p. 578. M. Dupin aine has published his learned and eloquent pleading in this memorable case, in his *Collection des Réquisitoires*, tome i. p. 447.

(*i*) *The Santissima Trinidad*, 7 Wheaton, 352.

(*k*) [*R.* v. *Anderson*, L. R. 1 C. C. R. 161].

And he also considers the vessels of a nation on the high seas as portions of its territory. Grotius holds that sovereignty may be acquired over a portion of the sea, *ratione personarum, ut si classis qui maritimus est exercitus, aliquo in loco maris se habeat.* But, as one of his commentators, Rutherforth, has observed, though there can be no doubt about the jurisdiction of a nation over the persons who compose its fleets when they are out at sea, it does not follow that the nation has jurisdiction over any portion of the ocean itself. It is not a permanent property which it acquires, but a mere temporary right of occupancy in a place which is common to all mankind, to be successively used by all as they have occasion (*l*).

This jurisdiction which the nation has over its public and private vessels on the high seas, is exclusive only so far as respects offences against its own municipal laws. Piracy and other offences against the law of nations, being crimes not against any particular State, but against all mankind, may be punished in the competent tribunal of any country where the offender may be found, or into which he may be carried, although committed on board a foreign vessel on the high seas (*m*).

Though these offences may be tried in the competent court of any nation having, by lawful means, the custody of the offenders, yet the right of visitation and search does not exist in time of peace. This right cannot be employed for the purpose of executing upon foreign vessels and persons on the high seas the prohibition of a traffic, which is neither piratical nor contrary to the law of nations, (such, for example, as the slave trade,) unless the visitation and search be expressly permitted by international compact (*n*).

Every State has an incontestable right to the service of all its members in the national defence, but it can give effect to this right only by lawful means. Its right to reclaim the military service of its citizens can be exercised only within its own territory, or in some place not subject to the jurisdiction

(*l*) Vattel, liv. i. ch. 19, § 216, liv. ii. ch. 7, § 80. Grotius, de Jur. Bel. ac. Pac. lib. ii. cap. iii. § 13. Rutherforth's Inst. vol. ii. b. 2, ch. 9, §§ 8, 19.

(*m*) Sir L. Jenkin's Works, vol. i. p. 711.

(*n*) *The Louis*, 2 Dods. Ad. 238; *The Marianna Flora*, 9 Wheaton, 39; *The Antelope*, 10 Wheaton, 122; *et vide infra*, § 120, *et seq.*

of any other nation. The ocean is such a place, and any State may unquestionably there exercise, on board its own vessels, its right of compelling the military or naval services of its subjects. But whether it may exercise the same right in respect to the vessels of other nations, is a question of more difficulty.

§ 107. Impressment of seamen by England.

In respect to public commissioned vessels belonging to the State, their entire immunity from every species and purpose of search is generally conceded. As to private vessels belonging to the subjects of a foreign nation, the right to search them on the high seas, for deserters and other persons liable to military and naval service, has been uniformly asserted by Great Britain, and as constantly denied by the United States. This litigation between the two nations, who by the identity of their origin and language are the most deeply interested in the question, formed one of the principal objects of the late war between them. It is to be hoped that the sources of this controversy may be dried up by the substitution of a registry of seamen, and a system of voluntary enlistment with limited service, for the odious practice of impressment which has hitherto prevailed in the British navy, and which can never be extended, even to the private ships of a foreign nation, without provoking hostilities on the part of any maritime State capable of resisting such a pretension (o).

§ 108. Discussions on this point.

The subject was incidentally passed in review, though not directly treated of, in the negotiations which terminated in the treaty of Washington, 1842, between the United States and Great Britain. In a letter addressed by the American negotiator to the British plenipotentiary on the 8th August, 1842, it was stated that no cause had produced, to so great an extent, and for so long a period, disturbing and irritating influences on the political relations of the United States and England, as the impressment of seamen by the British cruisers from American merchant vessels.

From the commencement of the French revolution to the breaking out of the war between the two countries in 1812, hardly a year elapsed without loud complaint and earnest remonstrance. A deep feeling of opposition to the right

(o) Edinburgh Review, vol. xi. art. 1. Mr. Canning's Letter to Mr. Monroe, September 23, 1807. American State Papers, vol. vi. p. 103.

claimed, and to the practice exercised under it, and not unfrequently exercised without the least regard to what justice and humanity would have dictated, even if the right itself had been admitted, took possession of the public mind of America; and this feeling, it was well known, co-operated with other causes to produce the state of hostilities which ensued.

At different periods, both before and since the war, negotiations had taken place between the two governments, with the hope of finding some means of quieting these complaints. Sometimes the effectual abolition of the practice had been requested and treated of; at other times, its temporary suspension; and, at other times, again, the limitation of its exercise and some security against its enormous abuses.

A common destiny had attended these efforts: they had all failed. The question stood at that moment where it stood fifty years ago. The nearest approach to a settlement was a convention, proposed in 1803, and which had come to the point of signature, when it was broken off in consequence of the British Government insisting that the "Narrow Seas" should be expressly excepted out of the sphere over which the contemplated stipulations against impressment should extend. The American minister, Mr. King, regarded this exception as quite inadmissible, and chose rather to abandon the negotiation than to acquiesce in the doctrine which it proposed to establish.

England asserted the right of impressing British subjects. She asserted this as a legal exercise of the prerogative of the crown; which prerogative was alleged to be founded on the English law of the perpetual and indissoluble allegiance of the subject, and his obligation, under all circumstances, and for his whole life, to render military service to the crown whenever required.

This statement, made in the words of eminent British jurists, showed at once that the English claim was far broader than the basis on which it was raised. The law relied on was English law; the obligations insisted on were obligations between the crown of England and its subjects. This law and these obligations, it was admitted, might be such as England chose they should be. But then they must be confined to the parties. Impressment of seamen, out of and

beyond the English territory, and from on board the ships of other nations, was an interference with the rights of other nations; it went, therefore, further than English prerogative could legally extend; and was nothing but an attempt to enforce the peculiar law of England beyond the dominions and jurisdiction of the crown. The claim asserted an extra-territorial authority for the law of British prerogative, and assumed to exercise this extra-territorial authority, to the manifest injury of the citizens and subjects of other States, on board their own vessels, on the high seas.

Every merchant vessel on those seas was rightfully considered as part of the territory of the country to which it belonged. The entry, therefore, into such vessel, by a belligerent power, was an act of force, and was, *primâ facie*, a wrong, a trespass which could be justified only when done for some purpose allowed to form a sufficient justification by the law of nations. But a British cruiser enters an American vessel in order to take therefrom supposed British subjects; offering no justification therefor under the law of nations, but claiming the right under the law of England respecting the king's prerogative. This could not be defended. English soil, English territory, English jurisdiction, was the appropriate sphere for the operation of English law. The ocean was the sphere of the law of nations; and any merchant vessel on the high seas was, by that law, under the protection of the laws of her own nation, and might claim immunity, unless in cases in which that law allows her to be entered or visited.

If this notion of perpetual allegiance, and the consequent power of the prerogative, were the law of the world; if it formed part of the conventional code of nations, and was usually practised, like the right of visiting neutral ships, for the purpose of discovering and seizing enemy's property; then impressment might be defended as a common right, and there would be no remedy for the evil until the international code should be altered. But this was by no means the case. There was no such principle incorporated into the code of nations. The doctrine stood only as English law, not as international law; and English law could not be of force beyond English dominion. Whatever duties or relations that law

creates between the sovereign and his subjects, could only be enforced within the realm, or within the proper possessions or territory of the sovereign. There might be quite as just a prerogative right to the property of subjects as to their personal services, in an exigency of the State; but no government thought of controlling, by its own laws, the property of its subjects situated abroad; much less did any government think of entering the territory of another power, for the purpose of seizing such property and appropriating it to its own use. As laws, the prerogatives of the crown of England have no obligation on persons or property domiciled or situated abroad.

"When, therefore," says an authority not unknown or unregarded on either side of the Atlantic, "we speak of the right of a State to bind its own native subjects everywhere, we speak only of its own claim and exercise of sovereignty over them, when they return within its own territorial jurisdiction, and not of its right to compel or require obedience to such laws on the part of other nations, within their own territorial sovereignty. On the contrary, every nation has an exclusive right to regulate persons and things within its own territory, according to its sovereign will and public polity."

§ 109. Other objections to impressment.

But impressment was subject to objections of a much wider range. If it could be justified in its application to those who are declared to be its only objects, it still remained true that, in its exercise, it touched the political rights of other governments, and endangered the security of their own native subjects and citizens. The sovereignty of the State was concerned in maintaining its exclusive jurisdiction and possession over its merchant ships on the seas, except so far as the law of nations justifies intrusion upon that possession for special purposes; and all experience had shown that no member of a crew, wherever born, was safe against impressment when a ship was visited.

In the calm and quiet which had succeeded the late war, a condition so favourable for dispassionate consideration, England herself had evidently seen the harshness of impressment, even when exercised on seamen in her own merchant service; and she had adopted measures, calculated if not to renounce the power or to abolish the practice, yet, at least, to super-

sede its necessity, by other means of manning the royal navy, more compatible with justice and the rights of individuals, and far more conformable to the principles and sentiments of the age.

Under these circumstances, the government of the United States had used the occasion of the British minister's pacific mission to review the whole subject, and to bring it to his notice and to that of his government. It had reflected on the past, pondered the condition of the present, and endeavoured to anticipate, so far as it might be in its power, the probable future; and the American negotiator communicated to the British minister the following, as the result of those deliberations.

The American government, then, was prepared to say that the practice of impressing seamen from American vessels could not hereafter be allowed to take place. That practice was founded on principles which it did not recognise, and was invariably attended by consequences so unjust, so injurious, and of such formidable magnitude, as could not be submitted to.

In the early disputes between the two governments, on this so long contested topic, the distinguished person to whose hands were first intrusted the seals of the Department of State declared, that "the simplest rule will be, that the vessel being American shall be evidence that the seamen on board are such."

Fifty years' experience, the utter failure of many negotiations, and a careful reconsideration of the whole subject when the passions were laid, and no present interest or emergency existed to bias the judgment, had convinced the American government that this was not only the simplest and best, but the only rule, which could be adopted and observed, consistently with the rights and honour of the United States, and the security of their citizens. That rule announced, therefore, what would hereafter be the principle maintained by their government. In every regularly documented American merchant vessel, the crew who navigated it would find their protection in the flag which was over them (*p*).

(*p*) Wheaton's Hist. Law of Nations, pp. 737—746. Mr. Webster's Letter to Lord Ashburton, August 8, 1842. [See Parl. Papers, 1842, p. 59].

§ 109a. Change of circumstances since the dispute arose.

It is hardly possible that this dispute should arise again. The practice of impressment has fallen into complete desuetude in England, and the alterations in the municipal laws of each country, added to the naturalization treaty between them, have altered the whole aspect of the question (*q*). England no longer claims the perpetual allegiance of her subjects; and even if she did, it is highly improbable that she would at the present day assert the right of taking them out of foreign vessels on the high seas.

At the beginning of the century Great Britain was engaged in a gigantic struggle with France, which she maintained to a great extent at sea. It appears from an Admiralty Minute of 1812, that there were supposed to be upwards of 20,000 British-born seamen in the American marine; many of them provided with fraudulent protections (*r*). Under such circumstances it is hardly surprising that the royal prerogative should have been called into force, for the purpose of seizing such as could be got at. If the question is to be decided according to the rules of international law as existing at the present day, Great Britain was perhaps in the wrong. She claimed to take persons alleged to be her subjects out of the ships of a friendly State on the high seas, and to force them into her service. This claim was appended to the right of search; that is, it was only exercised over neutral vessels in time of war. It was not alleged that the fact of English seamen being on board gave a British cruiser any right of stopping and searching the neutral vessel, but there being an admitted right of entering for the purpose of seizing contraband or enemy's goods, it was contended that British officers being rightfully on board, had also the power of seizing anyone they found there, who owed allegiance to the British crown (*s*). But the claim of England had in reality nothing to do with the right of search. The seamen she seized were neither contraband of war nor enemy's goods; they were seized simply because they owed allegiance. It so happened that the only way of catching them was by taking them out of foreign ships; and as they were not wanted during peace, there was no need for asserting the claim except during war, when the right of search existed. But these were circumstances which only accidentally connected impressment with the right of search. The two have nothing in common. It must, however, be remembered that international law has not always been, and is not even now, in all respects fixed and definite, and that the views of the present day are not precisely the same as those held at the beginning of the century (*t*).

§ 109b. Case of *The Trent*.

In 1861, the question as to how far a merchant vessel may be stopped on the high seas and persons taken out of her by the officers of a foreign government, reappeared in a very different form. The British mail-steamer *Trent* sailed from Havana for St. Thomas on the 7th November, 1861, under charge of a commander in the navy. There were on board as passengers two persons, viz., Messrs. Slidell and Mason, who

(*q*) [See at the end of this chapter].

(*r*) [Report of Naturalization Commission, 1869, p. 35, where a history of the impressment controversy will be found].

(*s*) [Proclamation of the Prince Regent, 1813, Annual Reg. 1813, p. 350].

(*t*) [Wheaton, by Dana, p. 179].

were commissioners of the Confederate States, proceeding to England and France. About nine miles from Cuba, *The Trent* was stopped by *The San Jacinto*, an American ship of war, the two commissioners, with their secretaries, were taken out, and *The Trent* was then allowed to continue her voyage. The commissioners were imprisoned in a military fortress in the United States. The British Government instantly demanded their restoration, with an apology for the aggression, and in case of refusal Lord Lyons was directed to withdraw from Washington (*u*). Instructions were given to the ambassadors of France, Austria, Prussia, Italy, and Russia, by their respective governments to sustain the demands of Great Britain.

It was contended by the United States that the persons seized were contraband of war, and that *The Trent* being a neutral merchant-vessel, it was the right of *The San Jacinto*, as a belligerent cruiser, to stop her for the purpose of ascertaining her true national character, and of seizing any contraband found on board. The detention of the Commissioners was, however, not persisted in, and they were delivered up on considerations connected with complaints previously made by the United States as to the impressment of seamen from their vessels (*x*). Although the American Government congratulated the captain of *The San Jacinto* "for the great public service he had rendered," and although his acts were approved by many eminent American jurists, the transaction cannot be regarded as justifiable. *The Trent* was on a *bonâ fide* voyage from one neutral port to another. She was a mail steamer, a class of vessel peculiarly exempt from molestation, and instead of being captured and brought before a Prize Court, she was simply stopped on the high seas, and certain arbitrary acts performed on board her by the American captain.

One of the reasons alleged by the captain of *The San Jacinto* for not bringing in *The Trent* for adjudication before a Prize Court was, that he wished to spare the other passengers the inconvenience of deviating from their voyage. Such a reason was no doubt humane and honourable, but it cannot be taken as sufficient to set aside a universal rule of public law, that a ship and cargo are not lawful prize until condemned by a competent court, and that until so condemned a captor has no right to do anything beyond bringing the ship before the court.

§ 110 Consular jurisdiction.

IV. The municipal laws and institutions of any State may operate beyond its own territory, and within the territory of another State, by special compact between the two States.

Such are the treaties by which the consuls and other commercial agents of one nation are authorised to exercise, over their own countrymen, a jurisdiction within the territory of the State where they reside. The nature and extent of this peculiar jurisdiction depends upon the stipulations of the

(*u*) [Parl. Papers, 1862, N. America (No. 5), p. 3].
(*x*) [Mr. Seward to Lord Lyons, 26th Dec. 1861].

treaties between the two States. Among Christian nations it is generally confined to the decision of controversies in civil cases arising between the merchants, seamen, and other subjects of the State in foreign countries; to the registering of wills, contracts, and other instruments executed in presence of the consul; and to the administration of the estates of their fellow-subjects deceased within the territorial limits of the consulate. The resident consuls of the Christian powers in Turkey, the Barbary States, and other Mohammedan countries, exercise both civil and criminal jurisdiction over their countrymen, to the exclusion of the local magistrates and tribunals. This jurisdiction is subject, in civil cases, to an appeal to the superior tribunals of their own country. The criminal jurisdiction is usually limited to the infliction of pecuniary penalties, and in offences of a higher grade, the consular functions are similar to those of a police magistrate, or *juge d'instruction*. He collects the documentary and other proofs, and sends them, together with the prisoner, home to his own country for trial (*y*).

Treaty between China and the United States.

By the treaty of peace, amity, and commerce, concluded at Wang Hiya, 1844, between the United States and the Chinese Empire, it is stipulated, Art. 21, that "citizens of the United States, who may commit any crime in China, shall be subject to be tried and punished only by the consul, or other public functionary of the United States thereto authorised, according to the laws of the United States." Art. 25. "All questions in regard to rights, whether of property or of person, arising between citizens of the United States and in China, shall be subject to the jurisdiction, and regulated by the authorities, of their own government. And all controversies occurring in China, between citizens of the United States, and the subjects of any other government, shall be regulated by the treaties existing between the United States and such governments respectively, without interference on the part of China."

§ 110a. British Consular

From a very early time, owing to the total difference of habits and religious feelings between Europeans and Asiatics, it was deemed

(*y*) De Steck, Essai sur les Consuls, sect. vii. §§ 30—40. Pardessus, Droit commercial, pt. vi. tit. 6, ch. 2, § 2, ch. 4, §§ 1, 2, 3. [As to English consuls, see Boyd, The Merchant Shipping Laws, Index, tit. Consular officer].

Courts in non-Christian countries.

necessary by their respective governments to withdraw Europeans from the authority of the native courts of these States. In process of time, and with the consent, express or implied, of the Turkish Government, a general system of Consular Courts became established throughout the Sultan's dominions. The Ottoman Porte gives to the Christian Powers of Europe authority to administer justice to their own subjects according to their own laws, but it does not profess to give, nor could it give, to one such Power any jurisdiction over the subjects of another Power. It has left those Powers at liberty to deal with each other as they may think fit; and if the subjects of one country desire to resort to the tribunals of another, there can be no objection to their doing so with the consent of their own Sovereign and that of the Sovereign to whose tribunals they resort (*z*). This kind of jurisdiction, exercised by the consuls of Christian States in Mohammedan countries, is to be carefully distinguished from the ordinary powers exercised by foreign consuls in Christian States (*a*). Judicial powers are not necessarily incident to the office of consul. These powers depend altogether upon treaty (*b*).

The numerous Orders in Council and other provisions for regulating the British Consular Courts in Turkey, were repealed and consolidated by an Order in Council, dated 12th December, 1873 (*c*). The position of British subjects in China and Japan is very similar to that they occupy in Turkey, and consular courts are established in those countries with much the same powers as those in Turkey (*d*).

The jurisdiction exercised by England in these eastern countries is regulated by an Act of Parliament, which recites that "by treaty, capitulation, grant, usage, sufferance, and other lawful means, Her Majesty hath power and jurisdiction within divers countries and places out of Her Majesty's dominions; and that doubts have arisen how far the exercise of such power and jurisdiction is controlled by and dependent upon the laws of this realm;" and enacts that "Her Majesty may exercise any power or jurisdiction which Her Majesty now hath or may at any time hereafter have, within any country out of Her Majesty's dominions, in the same and as ample a manner as if Her Majesty had acquired such power or jurisdiction by the cession or conquest of territory" (*e*).

§ 111. Independence of the State as to its judicial power.

Every sovereign State is independent of every other in the exercise of its judicial power.

This general position must, of course, be qualified by the exceptions to its application arising out of express compact, such as conventions with foreign States, and acts of confederation, by which the State may be united in a league with other

(*z*) [*The Laconia*, 2 Moo. P. C. N. S. 183].
(*a*) [*Messina* v. *Petrocochino*, L. R. 4 P. C. 158; *Dent* v. *Smith*, L. R. 4 Q. B. 445].
(*b*) [*Dainese* v. *Hale*, 1 Otto, 13].
(*c*) [See London Gazette, 19th Dec. 1873].
(*d*) [See Order in Council, 9th March, 1865. Hertslet, Commercial Treaties, vol. xii. p. 281. Phillimore, vol. ii. § 276, p. 314].
(*e*) [6 & 7 Vict. c. 94, s. 1. And see 41 & 42 Vict. c. 67].

States for some common purpose. By the stipulations of these compacts it may part with certain portions of its judicial power, or may modify its exercise with a view to the attainment of the object of the treaty or act of union.

§ 112. Exceptions.

Subject to these exceptions, the judicial power of every State is co-extensive with its legislative power. At the same time it does not embrace those cases in which the municipal institutions of another nation operate within the territory. Such are the cases of a foreign sovereign, or his public minister, fleet or army, coming within the territorial limits of another State, which, as already observed, are, in general, exempt from the operation of the local laws.

§ 113. Extent of the judicial power over criminal offences.

I. The judicial power of every independent State, then, extends, with the qualifications mentioned,—

1. To the punishment of all offences against the municipal laws of the State, by whomsoever committed, within the territory.

2. To the punishment of all such offences, by whomsoever committed, on board its public and private vessels on the high seas, and on board its public vessels in foreign ports.

3. To the punishment of all such offences by its subjects, wheresoever committed.

4. To the punishment of piracy and other offences against the law of nations, by whomsoever and wheresoever committed.

It is evident that a State cannot punish an offence against its municipal laws committed within the territory of another State, unless by its own citizens; nor can it arrest the persons or property of the supposed offender within that territory: but it may arrest its own citizens in a place which is not within the jurisdiction of any other nation, as the high seas, and punish them for offences committed within such a place, or within the territory of a foreign State.

By the Common Law of England, which has been adopted, in this respect, in the United States, criminal offences are considered as altogether local, and are justiciable only by the courts of that country where the offence is committed. But this principle is peculiar to the jurisprudence of Great Britain and the United States; and even in these two countries it has been frequently disregarded by the positive legislation of each, in the enactment of statutes, under which offences committed

by a subject or citizen, within the territorial limits of a foreign State, have been made punishable in the courts of that country to which the party owes allegiance, and whose laws he is bound to obey. There is some contrariety in the opinions of different public jurists on this question; but the preponderance of their authority is greatly in favour of the jurisdiction of the courts of the offender's country, in such a case, wherever such jurisdiction is expressly conferred upon those Courts, by the local laws of that country. This doctrine is also fully confirmed by the international usage and constant legislation of the different States of the European continent, by which crimes in general, or certain specified offences against the municipal code, committed by a citizen or subject in a foreign country, are made punishable in the courts of his own (*f*).

§ 113a. Jurisdiction of British Courts over crimes committed abroad.

The cases in which English Courts have jurisdiction to try offences committed abroad, are exceptions to the general rule that crimes are local. The following are the principal exceptions: Political offences, such as treason (*g*); administering unlawful oaths, and forging government documents (*h*). As these acts must necessarily be intended to take effect in the country against which they are devised, they may perhaps not be looked upon as a real exception. But homicide abroad is an undoubted exception. A British subject who commits murder or manslaughter abroad on land, whether within the Queen's dominions or without, and whether he kills a British subject or not, can be tried in England or Ireland wherever he may be apprehended. This is not to prevent his being tried elsewhere (*i*). Offences against property or person committed at any place, ashore or afloat, out of Her Majesty's dominions, by any master, seaman, or apprentice, who, at the time when the offence is committed, or within three months previously, has been employed in any British ship, may be tried in England (*k*).

§ 114. Laws of trade and navigation.

Laws of trade and navigation cannot affect foreigners, beyond the territorial limits of the State, but they are binding upon its citizens, wherever they may be. Thus, offences against the laws of a State, prohibiting or regulating any

(*f*) Fœlix, Droit international privé, §§ 510—532. See American Jurist, vol. xxii. pp. 381—386.

(*g*) [See Sir James Stephen's Digest of Criminal Law as to what is Treason, ch. vi.].

(*h*) [52 Geo. III. c. 104, s. 7. Wharton, Conflict of Laws, § 916].

(*i*) [24 & 25 Vict. c. 100, s. 9].

(*k*) [17 & 18 Vict. c. 104, s. 267. See further as to this The Foreign Jurisdiction Acts 1843 to 1878, 6 & 7 Vict. c. 94, and 41 & 42 Vict. c. 67].

particular traffic, may be punished by its tribunals, when committed by its citizens, in whatever place; but if committed by foreigners, such offences can only be thus punished when committed within the territory of the State, or on board of its vessels, in some place not within the jurisdiction of any other State.

§ 115. Extradition of criminals.

The public jurists are divided upon the question, how far a sovereign State is obliged to deliver up persons, whether its own subjects or foreigners, charged with or convicted of crimes committed in another country, upon the demand of a foreign State, or of its officers of justice. Some of these writers maintain the doctrine, that, according to the law and usage of nations, every sovereign State is obliged to refuse an asylum to individuals accused of crimes affecting the general peace and security of society, and whose extradition is demanded by the government of that country within whose jurisdiction the crime has been committed. Such is the opinion of Grotius, Heineccius, Burlamaqui, Vattel, Rutherforth, Schmelzing, and Kent (*l*). According to Puffendorf, Voet, Martens, Klüber, Leyser, Kluit, Saalfeld, Schmaltz, Mittermeyer, and Heffter, on the other hand, the extradition of fugitives from justice is a matter of imperfect obligation only; and though it may be habitually practised by certain States, as the result of mutual comity and convenience, requires to be confirmed and regulated by special compact, in order to give it the force of an international law (*m*). And the last-mentioned learned writer considers the very fact of the existence of so many special treaties respecting this matter as conclusive evidence that there is no such general usage among nations, constituting a perfect obligation, and having the force of law properly so called. Even under systems of confederated States, such as the Germanic Confederation and

(*l*) Grotius de Jur. Bel. ac. Pac. lib. ii. cap. xi. §§ 3—5. Heineccius, Prælect. in Grot. j. t. Burlamaqui, tome ii. pt. iv. ch. 3, §§ 23—29. Vattel, liv. ii. ch. 6, §§ 76, 77. Rutherforth, Inst. of Nat. Law, vol. ii. ch. 9, p. 12. Schmelzing, Systematischer Grundriss des praktischen Europäischen Völkerrechts, § 161. Kent's Comm. vol. i, pp. 36, 37, 5th ed.

(*m*) Puffendorf, Elementa, lib. viii. cap. 3, §§ 23, 24. Voet, de Stat. § 11, cap. 1, No. 6. Martens, Droit des Gens, liv. iii. ch. 3, § 101. Klüber, Droit des Gens, pt. ii. tit. 1, ch. 2, § 66. Leyser, Meditationes ad Pandect. Med. 10. Kluit, de Deditione, Profugorum, § 1, p. 7. Saalfeld, Handbuch des positiven Völkerrechts, § 40. Schmaltz, Europäisches Völkerrecht, p. 160; Mittermeyer, das deutsche Strafverfahren, Theil i. § 59, pp. 314—319; Heffter, Europäische Völkerrecht, § 63.

the North American Union, this obligation is limited to the cases and conditions mentioned in the federal compacts (*n*).

The negative doctrine that independent of special compact, no State is bound to deliver up fugitives from justice upon the demand of a foreign State, was maintained at an early period by the United States government, and is confirmed by a considerable preponderance of judicial authority in the American courts of justice, both State and Federal (*o*).

§ 116. Extradition by the U. S. Constitution.

The constitution of the United States (Art. 4, s. 2), provides that "a person charged in any State with treason, felony, or other crime, who shall flee from justice, and be found in another State, shall, on demand of the executive authority of the State from which he fled, be delivered up, to be removed to the State having jurisdiction of the crime."

§ 116a. Obligation of extradition not a decided point.

It is still a debated question whether the surrender of fugitives, except under a treaty, is an absolute international duty. The weight of modern authority inclines towards treating this as a matter of comity (*p*). In such a matter as this, if any rules can be laid down at all, they must be founded only on the practice of nations. A State is not likely to change its law or practice in this respect, because it is not in accordance with the theories of text-writers.

§ 116b. Practice of England.

The law of England has apparently undergone a change on this point during the present century. In some of the older cases it is laid down by the judges that the "government may send a prisoner to answer for a crime wherever committed" (*q*). In Lord Loughborough's time, the crew of a Dutch ship mastered the vessel and ran away with her, and brought her into Deal, and the question arose whether the English Courts could seize them and send them to Holland. It was held that they could (*r*). So late as 1827 the Provincial Court of Appeals for Lower Canada held that a fugitive accused of larceny in Vermont (U. S.), who escaped into Canada, could be surrendered to the United States, although there was then no treaty on the subject (*s*). There seems to be no doubt that this would not now be done. The constitutional doctrine in England is, that the Crown may make treaties with

(*n*) Mittermeyer, ibid.

(*o*) See Mr. Jefferson to Mr. Genet, Sept. 12th, 1793. The decision of Chancellor Kent, *In re Washburn*, 4 Johnson, Ch. Rep. 166, is counterbalanced by that of Tilghman, C. J., in *Respub.* v. *Deacon*, 10 Sergeant & Rawle, 125; by that of Parker, C. J., in *Respub.* v. *Green*, 17 Mass. 515—548; and by that of the Supreme Court in *Holmes* v. *Jennison*, 14 Peters, 540.

(*p*) [Phillimore, vol. i. § 367. Heffter, Droit international, p. 128. Molesworth on Foreign Jurisdiction, p. 37. Calvo, vol. i. § 377. Creasy, First Platform of International Law, § 208, &c.].

(*q*) [*East India Co.* v. *Campbell*, 1 Ves. 247].

(*r*) [*Mure* v. *Kaye*, 4 Taunt. 34].

(*s*) [*In re Fisher*, Stuart, Lower Canada Rep. 245].

foreign States for the extradition of criminals; but those treaties can only be carried into effect by Act of Parliament, for the executive has no power, without statutory authority, to seize an alien here and deliver him to a foreign power. Lord Denman said in the House of Lords that he believed all Westminster Hall, including the Judicial Bench, were unanimous in holding the opinion that in this country there was no right of delivering up; indeed, no means of securing persons accused of crimes committed in foreign countries (*t*). It may thus be regarded as certain that England will not at present surrender fugitives except under a treaty. Nevertheless, she does not hesitate to ask other countries for fugitives from herself. Thus, in 1874, the Spanish Government, at the request of England, gave up Austin Bidwell, one of the Bank forgers, without there being at the time any treaty between the two countries (*u*). The Royal Commission on extradition (1878) have suggested that a statutory power of surrendering fugitive criminals, irrespectively of the existence of any treaty, should be created in England. This is no doubt the best course. It is as much to our advantage to get rid of such persons as it is for the foreign State to punish them. But this power does not yet exist (*x*).

§ 116c. Practice of the United States.

The practice of the United States has not always been uniform. In 1791, the Governor of South Carolina made a request that the President should demand the surrender of certain persons from Florida (then Spanish territory), who had committed crimes in South Carolina, and then fled to Florida. Mr. Jefferson said respecting this, "The laws of the United States, like those of England, receive every fugitive, and no authority has been given to our executives to give them up * * * * * If, then, the United States could not deliver up to Florida a fugitive from the laws of his country, we cannot claim as a right the delivery of fugitives from us" (*y*). Mr. Monroe, as Secretary of State, in his instructions to the American Commissioners at Ghent, in 1814, says, "Offenders, even conspirators, cannot be pursued by one power into the territory of another, nor are they delivered up by the latter, except in compliance with treaties, or by favour" (*z*). These passages show that, in the opinion of the writers, the Executive were neither bound, nor able to surrender fugitives at the time, in the absence of treaty or special legislation. The opinion Mr. Legare, Attorney-General, delivered in 1841 is to the same effect (*a*). In 1864 a somewhat different opinion was adopted. Arguelles, the Governor of a district in Cuba, wrongfully sold certain negroes into slavery while in his charge, with the aid of forged papers, and then escaped to New York. There was at the time no treaty between Spain and America, but Spain asked for the surrender of Arguelles as a matter of comity, and the United States complied. The Senate thereupon requested the President to inform

Case of Arguelles.

(*t*) [Forsyth, Cases and Opinions, p. 369. And see Earl Russell to Mr. Adams, 12th June, 1862; U. S. Dipl. Cor. 1862, p. 111].
(*u*) [Clarke on Extradition (2nd ed.), p. 71, note].
(*x*) [Report, 1878. Parl. papers, c.—2039].
(*y*) [Jefferson's Works (ed. 1854), vol. iii. p. 299].
(*z*) [See *Holmes* v. *Jennison*, 14 Peters, 549].
(*a*) [Opinions of Attorneys-General, vol. 3, p. 661].

them under what authority of law or treaty he had surrendered Arguelles. Mr. Seward prepared an elaborate defence of the affair, in which he examined the state of international law when not regulated by treaty. After citing various authorities (*b*), he came to the conclusion, "upon the plainest reason, and a uniform concurrence of authority, that the United States, in its relations to foreign nations, certainly possesses the authority to surrender to the pursuing justice of a foreign State, a fugitive criminal found within our territory" (*c*).

§ 116d. Case of Carl Vogt.

In 1873, the earlier rule of refusing to grant extradition without a treaty, was reverted to in a case where the law should have been pushed to its furthest limits to obtain the conviction of the offender. In that year, Carl Vogt, a German subject, was accused of robbery, arson, and murder in Belgium, and escaped to the United States. There was at the time a treaty with Germany, but none with Belgium. Both these countries applied for the fugitive, but the United States refused to give him up to either. The application of Germany was refused on the ground that the crimes were not committed within her jurisdiction, and that of Belgium on the ground of there being no treaty (*d*). In giving an opinion on this case, the Attorney-General said, "Some writers have contended that there is a reciprocal obligation upon nations to surrender fugitives from justice, but it now seems to be generally agreed that this is altogether a matter of comity. It is to be presumed, where there are treaties upon the subject, that fugitives are to be surrendered only in cases and upon the terms specified in such treaties" (*e*). It seems altogether highly improbable that America will now surrender criminals independently of treaty.

§ 116e. Extradition in France.

French jurists are of opinion that the right of sending fugitive criminals to the country where their crime was committed, is inherent in every government, and exists independently of all treaties. Treaties are deemed to regulate the mode in which the right is to be exercised, and not to create it (*f*). A circular of the Minister of Justice, issued in 1841, states that most civilized countries, except England and America, would surrender notorious criminals without being bound to do so by treaty (*g*).

Practice of States is not uniform.

It is thus evident that the practice of nations does not furnish a definite rule on the subject. It may therefore be assumed that the surrender of criminals is not at present looked upon as an absolute international duty. Every State may refuse to harbour fugitives if it pleases; but if it prefers to receive and protect them, other States have no remedy but to enter into treaties with it to regulate the future.

§ 116f. What criminals

It seems to be agreed that extradition should be confined to grave crimes, such as murder, robbery with violence, forgery, and those offences which it is the common interest of all nations to suppress.

(*b*) [Wheaton, § 115. Halleck, ch. vii. § 28. Story, Conflict of Laws, § 626. *U. S.* v. *Davis*, 2 Sumner, 486].
(*c*) [U. S. Dipl. Cor. 1864, pt. iv. p. 40].
(*d*) [U. S. Dipl. Cor. 1873, pp. 81 and 300].
(*e*) [Opinions of Attorneys-General (U. S.), vol. xiv. p. 288].
(*f*) [Mouton, Les Lois pénales de la France, tom. i. p. 9].
(*g*) [Dalloz, Jurisp. Gen. 1841, p. 440].

are subject to extradition.

Mr. Field, in his International Code, gives the following classes of acts as not creating a liability to extradition: (1) Crimes or offences of a purely political character; (2) any offence committed in furthering civil war, insurrection or political commotion, which, if committed between belligerents, would not be a crime; (3) desertions from, or evasions of, military or naval service; (4) offences which, by reason of the lapse of time or any other cause, the demanding nation cannot lawfully punish (*i*).

§ 116g. Political refugees.

It is an almost universal rule that no State will surrender political refugees (*k*). But if the hospitality of a State is so abused by such refugees, that the safety of its neighbours becomes imperilled, it then becomes its duty to adopt such measures as will control them, and make their residence harmless to other States (*l*). After the attempt to assassinate Napoleon III. on the 10th of January, 1858, France represented that the plot had been formed in England, and asked that England should provide for the punishment of such offences. Lord Palmerston accordingly introduced a Bill for the punishment of conspiracies formed in England to commit murder beyond Her Majesty's dominions, but it fell through (*m*). Sardinia at the same time passed a law punishing such acts when committed in her territory (*n*).

§ 117. The Ashburton Treaty.

By Art. X. of the treaty concluded at Washington on the 9th August, 1842, between the United States and Great Britain, it was "agreed that Her Britannic Majesty and the United States shall, upon mutual requisitions by them or their ministers, officers, or authorities, respectively made, deliver up to justice all persons who, being charged with the crime of murder, or assault with intent to commit murder, or piracy, or arson, or robbery, or forgery, or the utterance of forged paper, committed within the jurisdiction of either, shall seek an asylum, or shall be found within the territories of the other:—provided, that this shall only be done upon such evidence of criminality as, according to the laws of the place where the fugitive or person so charged shall be found, would justify his apprehension and commitment for trial, if the crime or offence had there been committed; and the respective judges and other magistrates of the two Governments shall have power, jurisdiction, and authority, upon complaint made under oath, to issue a warrant for the

(*i*) [See Field, International Code, § 214, notes, where the provisions of the principal existing treaties are analysed].

(*k*) [Forsyth, Cases and Opinions, p. 371. Woolsey, § 79].

(*l*) [Bluntschli, Le Droit international codifié, § 396].

(*m*) [Annual Reg. 1858, pp. 5, 33, 202. Annuaire des deux Mondes, 1857—8, pp. 32, 110, 420].

(*n*) [Annuaire des deux Mondes, 1857—8, p. 216].

apprehension of the fugitive or person so charged, that he may be brought before such judges or other magistrates respectively, to the end that the evidence of criminality may be heard and considered; and if, on such hearing, the evidence be deemed sufficient to sustain the charge, it shall be the duty of the examining judge or magistrate to certify the same to the proper executive authority, that a warrant may issue for the surrender of such fugitive. The expense of such apprehension and delivery shall be borne and defrayed by the party who makes the requisition and receives the fugitive."

§ 117a. Construction of this treaty.

The construction of this treaty has given rise to some difficulties. It has been held that piracy in it does not include piracy *jure gentium*, but is confined to piracy by municipal law. As pirates *jure gentium* can be tried anywhere, it was considered that there was no need to give them up (*o*). In another case the Lord Chief Justice said, "We must assume that the terms employed are used in a sense which they would have in the law of both countries, and not in a sense wholly peculiar to some local law in one of them." And, therefore, where certain acts were made forgery by the law of New York, but did not amount to forgery in England, or by the general law of the United States, the fugitive accused of such acts was not delivered up (*p*). If the evidence presents several views of the case, on any one of which, if adopted, there may be a conviction, it has been held in Canada that the prisoner may be extradited (*q*). It has also been determined in Canada that the extradition treaty contains the whole law of surrender between the United States and Canada (*r*). The offence must also have been committed within the jurisdiction of the country demanding the surrender of the fugitive. In 1858, Thomas Allsop, a British subject, was charged as an accessory before the fact to the murder of a Frenchman in Paris, and escaped to the United States. He could have been tried for this in England (*s*), but the law officers held that his surrender could not be demanded from America under the treaty, since he was not charged with a crime committed within British jurisdiction (*t*). But where a person was charged with murder on the high seas, on board a British ship, this

(*o*) [*In re Tirnan*, 5 B. & S. 643; 10 L. T. N. S. 449. Cockburn, C.-J., dissented from the opinion of the majority. See also the case of *The Chesapeake*, Parl. Papers, N. America, No. 10 (1876), p. 37].

(*p*) [*In re Windsor*, 6 B. & S. 527; *In re Trueman Smith*, 4 Upper Canada Practice Rep. 215. As to murder, see *Anderson's case*, Ann. Reg. 1861, p. 520. As to construction of treaty with France, see *The Lennie Mutineers*, Parl. Papers, N. America, 1876 (No. 1), p. 97].

(*q*) [*R.* v. *Gould*, 20 Upper Canada C. P. 154].

(*r*) [*R.* v. *Tubbee*, 1 Upper Canada Prac. Rep. 98].

(*s*) [24 & 25 Vict. c. 100, s. 9; and 24 & 25 Vict. c. 94, s. 1].

(*t*) [Forsyth, Cases and Opinions on Constitutional Law, p. 368. And see Opinions of Attorneys-General (U. S.), vol. viii. 215].

was held to be within British jurisdiction, and the prisoner was accordingly surrendered by the United States (*u*).

§ 117b. Extradition Act, 1870.

In 1870, an Extradition Act was passed in England (*x*), which provides *inter alia*, that "A fugitive criminal shall not be surrendered to a foreign State unless provision is made by the law of that State, or by arrangement, that the fugitive shall not, until he has been restored or had an opportunity of returning to Her Majesty's dominions, be detained or tried in that foreign State for any offence committed prior to his surrender, other than the extradition crime proved by the facts on which the surrender is grounded" (*y*). In February, 1875, a person named Laurence escaped from the United States, and sailed for England. The American Government requested that he should be arrested on his arrival on a charge of forgery. This was done, and he was accordingly sent back. Before the trial Her Majesty's Government were informed that he was also to be tried on a charge of smuggling, an offence not included in the treaty. Lord Derby thereupon instructed the British Minister in America to protest if Laurence was tried for any crime but that for which he had been extradited. Mr. Fish contended that neither by the general law of extradition, nor the practice of both countries, could such a proviso be implied in the treaty (*z*). He cited the cases of Von Aerman (*a*), Paxton (*b*), Caldwell (*c*), and Burley (*d*), to show that, under the treaty, criminals had been extradited for one offence and tried for another; and he contended that the Act of 1870, being subsequent to the treaty, and made by only one party, could not incorporate any new terms into it. Lord Derby declined to recede, and refused to give up various other American fugitives, whose surrender had been asked for, unless the United States would agree to try them for no other offences but those they were extradited for. His Lordship quoted the case of *The Lennie* mutineers (*e*), where it was held that a prisoner delivered up under the French Extradition Treaty for murder, could not be tried in England for being an accessory after the fact. The discussion ended, without any conclusion being arrived at; Mr. Fish informing Lord Derby that Laurence would not be tried for anything but forgery, the offence for which he was surrendered (*f*).

Case of Laurence.

The President, in his message to Congress in 1877, stated that both the English and American Governments "are now in accord in the belief that the question is not one that should be allowed to frustrate the ends of justice, or to disturb the friendship between the two nations.

(*u*) [*In re Bennett*, 11 L. T. N. S. 488].
(*x*) [33 & 34 Vict. c. 52. See Appendix B.].
(*y*) [Ibid. sect. 3, sub-sect. (2)].
(*z*) [Mr. Fish to Col. Hoffmann, Parl. Papers, N. America, 1876 (No. 1), p. 80].
(*a*) [4 Upper Canada Rep. 288].
(*b*) [10 Lower Canada Jur. 212].
(*c*) [8 Blatchford, C. C. 131].
(*d*) [Parl. Papers, N. America, 1876 (No. 3)].
(*e*) [Old Bailey, 4th May, 1876, Parl. Papers, N. America, 1876 (No. 1), p. 97. See 36 & 37 Vict. c. 60, s. 3. Appendix B.].
(*f*) [Mr. Fish to Mr. Pierrepont, Aug. 5th, 1876, Parl. Papers, N. America, 1877 (No. 1), p. 5].

No serious difficulty has arisen in accomplishing the extradition of criminals where necessary. It is probable that all points of disagreement will, in due time, be settled, and, if need be, more explicit declarations be made in a new treaty" (*g*).

French decision.

The French Courts have recently laid it down as a principle of international law that a prisoner whose extradition has been obtained, cannot be tried for any crimes but those mentioned in the demand for his surrender (*h*).

§ 118. Treaty between France and the United States.

By the convention concluded at Washington on the 9th November, 1843, between the United States and France, it was agreed:

"Art. 1. That the high contracting parties shall, on requisitions made in their name, through the medium of their respective diplomatic agents, deliver up to justice persons who, being accused of the crimes enumerated in the next following article, committed within the jurisdiction of the requiring party, shall seek an asylum or shall be found within the territories of the other: Provided, That this shall be done only when the fact of the commission of the crime shall be so established, as that the laws of the country, in which the fugitive or the person so accused shall be found, would justify his or her apprehension and commitment for trial, if the crime had been there committed.

"Art. 2. Persons shall be so delivered up who shall be charged, according to the provisions of this convention, with any of the following crimes, to wit: murder (comprehending the crimes designated in the French penal code by the terms assassination, parricide, infanticide, and poisoning), or with an attempt to commit murder, or with rape, or with forgery, or with arson, or with embezzlement by public officers, when the same is punishable with infamous punishment.

"Art. 3. On the part of the French government the surrender shall be made only by authority of the Keeper of the Seals, Minister of Justice; and on the part of the Government of the United States, the surrender shall be made only by the authority of the Executive thereof.

"Art. 4. The expenses of any detention and delivery, effected in virtue of the preceding provisions, shall be borne

(*g*) [Annual Message to Congress, 1877. See the *Times*, 18th Dec. 1877].
(*h*) [Dalloz. Jurisp. Gen. 1874, p. 502].

and defrayed by the government in whose name the requisition shall have been made.

"Art. 5. The provisions of the present convention shall not be applied in any manner to the crimes enumerated in the second Article, committed anterior to the date thereof, nor to any crime or offence of a purely political character."

§ 119. Additional article.

The following additional article to the above convention was concluded between the contracting parties at Washington on the 24th February, 1845, and subsequently ratified.

"The crime of robbery, defining the same to be the felonious and forcible taking from the person of another, of goods or money, to any value, by violence or putting him in fear; and the crime of burglary, defining the same to be, breaking and entering by night into a mansion-house of another, with intent to commit felony; and the corresponding crimes included under the French law in the words *vol qualifié crime*, not being embraced in the second article of the convention of extradition concluded between the United States and France on the 9th of November, 1843, it is agreed by the present article, between the high contracting parties, that persons charged with those crimes shall be respectively delivered up, in conformity with the first article of the said convention; and the present article, when ratified by the parties, shall constitute a part of the said convention, and shall have the same force as if it had been originally inserted in the same" (*i*).

§ 120. Extradition treaties.

In the negotiation of treaties, stipulating for the extradition of persons accused or convicted of specified crimes, certain rules are generally followed, and especially by constitutional governments. The principle of these rules is, that a State should never authorize the extradition of its own citizens or subjects, or of persons accused or convicted of political or purely local crimes, or of slight offences, but should confine the provision to such acts as are, by common accord, regarded as grave crimes (*k*).

The delivering up by one State of deserters from the military or naval service of another also depends entirely upon

(*i*) [The treaties of France with other countries are collected in Billot, De l'Extradition (1874), pp. 471—571].

(*k*) Ortolan, Régles Internationales de la Mer. t. i. p. 340.

mutual comity, or upon special compact between different nations (*l*).

§ 120a. Surrender of its own subjects by a State.

In countries whose jurisprudence is founded on the civil law, crimes committed abroad by subjects can be punished at home. Such States, therefore, usually decline to surrender their own subjects (*m*). But where the common law prevails crimes are regarded as local, and punishable only by the laws of the place where they were committed. In this case the surrender of subjects for crimes committed abroad is absolutely necessary if the offenders are to be punished at all. British courts have no jurisdiction, except in cases of treason and homicide (*n*), to try British subjects for offences committed in foreign countries. Therefore, unless England agrees to surrender her subjects accused of other offences abroad, they will escape scot free. This has actually happened in a very recent case. A British subject was, in 1877, accused of larceny in Switzerland, and escaped to England. The Swiss Government applied for his extradition, under their treaty with England made in 1874. In February, 1875, an Order in Council had been issued pursuant to the Extradition Act, 1870, declaring that the Act applied to Switzerland (*o*). But the Order also contained this clause: "No Swiss shall be delivered up by Switzerland to the Government of the United Kingdom, and no subject of the United Kingdom shall be delivered up by the government thereof to Switzerland." Counsel for the Swiss Government contended that the terms of this clause were not imperative, but merely meant that neither government should be bound to deliver up its own subjects. The Court, however, came to the conclusion that the clause was imperative, and that under it each government could not surrender its own subjects. The prisoner was therefore discharged (*p*). Lord Chief Justice Cockburn characterised this as a blot on our system of extradition. Both England and the United States are willing to surrender their own subjects (*q*), but continental nations, as a rule, are not. The only means of insuring the punishment of all extraditable offenders is either for continental nations to surrender their own subjects, or for England and America to make their treaties with the continental States non-reciprocal; that is, that they should agree to surrender their own subjects, while allowing the continental States to keep theirs. The Royal Commission on extradition suggest that reciprocity in this matter should no longer be insisted upon, whether the criminal be a British subject or not. If he has broken the laws of a foreign country, his liability to be tried by them ought not to depend upon his nationality (*r*). The only real ground for refusing to surrender

Case of Wilson.

(*l*) Bynkershoek, Quæst. Jur. Pub. lib. i. cap. 22. Note to Duponceau's Transl. p. 174.

(*m*) [As to France, see Billot, De l'Extradition, p. 64. As to Germany, see Clarke on Extradition (2nd ed.), p. 66].

(*n*) [See *ante*, § 113a].

(*o*) [*London Gazette*, 1875, vol. i. p. 702].

(*p*) [*R.* v. *Wilson*, 3 Q. B. D. 42].

(*q*) [*Burley's case*, Parl. Papers, 1876, N America (No. 3), p. 12. Per Cockburn, C.-J., in *In re Windsor*, 6 B. & S. 527; *Ex parte Von Aernam*, 3 Blatchford, C. C. 160].

(*r*) [Report of Commission, 1878. Parl. papers, c.—2039.]

subjects is when they are not likely to be fairly treated by the State demanding them; and this does not apply to most civilized States.

The convenience of trying crimes in the country where they were committed is obvious. It is very much easier to transport the criminal to the place of his offence, than to carry all the witnesses and proofs to some other country where the trial is to be held.

§ 121. Extra-territorial operation of a criminal sentence.

A criminal sentence pronounced under the municipal law in one State can have no direct legal effect in another. If it is a sentence of conviction, it cannot be executed without the limits of the State in which it is pronounced upon the person or property of the offender; and if he is convicted of an infamous crime, attended with civil disqualifications in his own country, such a sentence can have no legal effect in another independent State (*s*).

But a valid sentence, whether of conviction or acquittal, pronounced in one State, may have certain indirect and collateral effects in other States. If pronounced under the municipal law in the State where the supposed crime was committed, or to which the supposed offender owed allegiance, the sentence, either of conviction or acquittal, would, of course, be an effectual bar (*exceptio rei judicatæ*) to a prosecution in any other State. If pronounced in another foreign State than that where the offence is alleged to have been committed, or to which the party owed allegiance, the sentence would be a nullity, and of no avail to protect him against a prosecution in any other State having jurisdiction of the offence.

The judicial power of every State extends to the punishment of certain offences against the law of nations, among which is piracy.

§ 122. Piracy under the law of nations.

Piracy is defined by the text writers to be the offence of depredating on the seas, without being authorised by any sovereign State, or with commissions from different sovereigns at war with each other (*t*).

§ 122a. Ingredients of piracy.

"Piracy," said Sir Charles Hedges, Judge of the Admiralty Court, to the Grand Jury, in 1696, "is only a sea term for robbery, piracy being a robbery committed within the jurisdiction of the Admiralty * * *

(*s*) Martens, Précis, &c., liv. iii. ch. 3, § 86. Klüber, Droit des Gens Moderne de l'Europe, pt. ii. tit. 1, ch. 2, §§ 64, 65. Fœlix, Droit International Privé, § 565.

(*t*) See authorities cited in note to the case of *United States* v. *Smith*, 5 Wheaton, 157.

If the mariners of any ship shall violently dispossess the master, and afterwards carry away the ship itself, or any of the goods, or tackle, apparel, or furniture, with a felonious intention in any place where the Lord Admiral hath, or pretends to have, jurisdiction, this is also robbery and piracy" (u). "I apprehend," said Dr. Lushington, "that in the administration of our criminal law, generally speaking, all persons are held to be pirates who are found guilty of piratical acts; and piratical acts are robbery and murder on the high seas * * * * It was never deemed necessary to inquire whether the parties so convicted had intended to rob or to murder on the high seas indiscriminately" (v). In the case then before the Court it was urged that the acts complained of had been committed in a bay, and not on the high seas, and were therefore not legally piratical. To this Dr. Lushington replied, "the ships were carried away and navigated by the very same persons who originally seized them. I consider the possession at sea to have been a piratical possession, and the carrying away the ships on the high seas to have been piratical acts" (x). An offence committed on the high seas is not piracy *jure gentium* so long as the ship on which it is committed remains subject to the authority of the State to which it belongs. A chief ingredient of piracy is throwing off this authority.

§ 123. Commissioned cruisers.

The officers and crew of an armed vessel commissioned against one nation, and depredating upon another, are not liable to be treated as pirates in thus exceeding their authority. The State by whom the commission is granted, being responsible to other nations for what is done by its commissioned cruisers, has the exclusive jurisdiction to try and punish all offences committed under colour of its authority (y).

The offence of depredating under commissions from different sovereigns at war with each other is clearly piratical, since the authority conferred by one is repugnant to the other; but it has been doubted how far it may be lawful to cruise under commissions from different sovereigns allied against a common enemy. The better opinion, however, seems to be, that although it might not amount to the crime of piracy, still it would be irregular and illegal, because the two co-belligerents may have adopted different rules of conduct respecting neutrals, or may be separately bound by engagements unknown to the party (z).

(u) [*R.* v. *Dawson and others*, 13 State Trials, 454, approved of in *Attorney-General for Hongkong* v. *Kwok-a-Sing*, L. R. 5 P. C. 199].

(v) [*The Magellan Pirates, Shipping and Mercantile Gazette*, 27th July, 1853. Phillimore, vol. i. p. 424].

(x) [16 Jurist, 1145. And see the Criminal Code Bill, 1878, s. 59].

(y) Bynkershoek, Quæst. Jur. Pub. lib. i. cap. 17. Rutherforth's Inst. vol. ii. p. 595.

(z) Bynkershoek, Quæst. Jur. Pub. lib. i. cap. 17, p. 130, Duponceau's

§ 124. Piracy triable everywhere.

Pirates being the common enemies of all mankind, and all nations having an equal interest in their apprehension and punishment, they may be lawfully captured on the high seas by the armed vessels of any particular State, and brought within its territorial jurisdiction for trial in its tribunals (*a*).

Distinction between piracy by the law of nations and piracy under municipal statutes.

This proposition, however, must be confined to piracy as defined by the law of nations, and cannot be extended to offences which are made piracy by municipal legislation. Piracy under the law of nations may be tried and punished in the courts of justice of any nation, by whomsoever and wheresoever committed; but piracy created by municipal statute can only be tried by that State within whose territorial jurisdiction, and on board of whose vessels, the offence thus created was committed. There are certain acts which are considered piracy by the internal laws of a State, to which the law of nations does not attach the same signification. It is not by force of the international law that those who commit these acts are tried and punished, but in consequence of special laws which assimilate them to pirates, and which can only be applied by the State which has enacted them, and then with reference to its own subjects, and in places within its own jurisdiction. The crimes of murder and robbery committed by foreigners, on board of a foreign vessel, on the high seas, are not justiciable in the tribunals of another country than that to which the vessel belongs; but if committed on board of a vessel not at the time belonging, in fact as well as right, to any foreign power or its subjects, but in possession of a crew acting in defiance of all law, and acknowledging obedience to no flag whatsoever, these crimes may be punished as piracy under the law of nations in the courts of any nation having custody of the offenders (*b*).

Transl. tom. ii. p. 236. Valin, Commentaire sur l'Ord. de la Marine. "The law," says Sir L. Jenkins, "distinguishes between a pirate who is a highwayman, and sets up for robbing, either having no commission at all, or else hath two or three, and a lawful man of war that exceeds his commission."—*Works*, vol. ii. p. 714.

(*a*) "Every man, by the usage of our European nations, is *justiciable* in the place where the crime is committed: so are pirates, being reputed out of the protection of all laws and privileges, and to be tried in what ports soever they may be taken."—*Sir L. Jenkins' Works*, ib.

(*b*) *U. S.* v. *Klintock*, 5 Wheaton, 144; *U. S.* v. *Pirates*. Ibid. 184.

§ 124a. Insurgents carrying on war at sea.

When an insurrection or rebellion has broken out in any State, the rebel cruisers may be treated as pirates by the established government, if the rebel government has not been recognised as a belligerent by the parent State, or by foreign nations; but this right ceases to exist on the recognition of the rebels as belligerents (*e*). During the American war of independence, an Act was passed by the English parliament, the object of which was to declare that the legal *status* of the revolted Americans was that of felons or pirates, but as a matter of fact none of the prisoners were so treated (*f*). The American civil war assumed such gigantic proportions at the outset, that there was very little time during which it could be doubted whether it was actually a civil war or only a partial insurrection, and the President's proclamation of the 19th April, 1861, declaring the Confederate ports blockaded, settled the point, by virtually recognising the South as belligerents. From that time the duly commissioned Southern cruisers became entitled to the rights of war, and ceased to be pirates.

§ 124b. Rebels without a commission.

When rebels cannot produce a regular commission from their government, the question of whether they are pirates becomes to a great extent one of intention. If their acts are not done with a piratical intent, but with an honest intention to assist in the war, they cannot be treated as pirates. But it is not because they assume the character of belligerents, that they can thereby protect themselves from the consequences of acts really piratical (*g*). If their acts are at first unauthorised, but are subsequently avowed by the insurgent government, this may or may not take them out of the category of pirates. A recognition of belligerency does not imply that other acts than those of war will be recognised, and the avowal of any past proceedings is not an act of war (*h*).

§ 124c. The case of *The Cagliari.*

A case which gave rise to considerable discussion, and caused great excitement at the time, occurred during the Neapolitan insurrection of 1857. *The Cagliari*, a Sardinian merchant steamer, running between Genoa and Tunis, left Genoa, on one of her regular voyages, on the 25th June, 1857, with thirty-three passengers, a crew of thirty-two men, and a cargo partly consisting of firearms. While on the high seas on the same evening, about twenty-five of her passengers suddenly produced concealed arms, took forcible possession of the ship, placed the master and some of the other passengers and crew under restraint, and took the ship to Ponga, a Neapolitan fortress and prison on an island. The mutineers landed at Ponga, and overpowering the garrison took possession of the fortress, and liberated 300 prisoners. Thus reinforced they committed other excesses, and then proceeded in *The Cagliari* to Sapri, where they were soon after all killed or taken prisoners by the Neapolitan troops. The master then resumed his authority over *The Cagliari*, and left Sapri, announcing his intention of going to Naples and informing the

(*e*) [*Rose* v. *Himely*, 4 Cranch, 272; *The Prize Causes*, 2 Black. 273; *Miller* v. *U. S.* 11 Wallace, 268. See *ante*, § 27a, *et seq.*].

(*f*) [17 Geo. III. c. 9].

(*g*) [*In re Tirnan*, 5 B. & S. 643: 10 L. T. N. S. 449; *U. S.* v. *Klintock*, 5 Wheaton, 149].

(*h*) [See judgment of Mr. Justice Wilson in the case of *Burley*, Parl. Papers, N. America, 1876 (No. 3), p. 19].

Neapolitan government of what had occurred. About twelve miles west of Capri, on the high seas, *The Cagliari* fell in with two Neapolitan cruisers, who boarded her, and not deeming the explanations of the captain satisfactory, took possession of the ship and conveyed her to Naples. The ship was condemned as prize by a Neapolitan Prize Court, and the crew were imprisoned. *The Cagliari* at the time of her capture carried the Sardinian flag, and on receiving the news of this event, the Sardinian government demanded the release of the ship and her crew. Naples refused on the ground that the vessel had been engaged in warlike acts against the country, and that the master and crew had assisted in these acts. Among the crew were two British subjects, named Watts and Park, who acted as engineers. England demanded their release, but it was not until they had been confined for ten months that Naples surrendered them, and then only upon the ground of yielding to superior force. The ship and the rest of the crew were afterwards surrendered on the same ground to a British consul—no notice being taken of Sardinia—and were sent by the consul to Genoa. The right of Sardinia to claim their release was never admitted by Naples.

After this, the Superior Prize Court of Naples decided that *The Cagliari* was rightly seized on the high seas, as having been engaged in acts which were partly warlike and partly piratical, with the fault of her master and crew.

The British law officers were of opinion that the seizure was, under the circumstances, justifiable, but that there was no ground for the condemnation, or for the imprisonment of the two British subjects. They said, "We forbear from enlarging upon the serious consequences which would, in our opinion, result to every maritime State, and to none more than Great Britain, from it being held that nothing short of complete legal proof of guilt or the actual commission of crime, at the moment of capture, will justify a national ship of war in capturing a vessel under such circumstances as those in which *The Cagliari* was captured." There was no doubt the ship had been concerned in the insurrectionary movement, and the captors could not be expected to institute a full inquiry on the high seas, for the purpose of ascertaining whether the actual crew found on board had participated in this or not.

The case, however, was materially altered when it came before the Prize Court at Naples. The evidence clearly showed that the captain and crew had acted under compulsion, and that the owners of the ship were entirely innocent. Nor was any complicity proved against the two English engineers. Naples ought, therefore, to have immediately surrendered the ship to Sardinia, and liberated the crew. The only justifiable grounds for such a seizure, were on the supposition that *The Cagliari* was a rebel vessel, and not entitled to carry the Sardinian flag. An insurrection may be carried on by sea as well as by land, and the government may capture ships of its revolted subjects on the high seas. But as no war existed at the time, Naples had no belligerent right of search, or of bringing foreign vessels for adjudication before a Prize Court. A Prize Court was not the proper tribunal to hear the case. If *The Cagliari* was to be adjudicated on at all, it should have been before a municipal court, and her crew should have been tried as rebels or

pirates. As it was proved that she was entitled to carry the Sardinian flag, every claim to her detention thereupon disappeared, since no ship of a foreign State can be seized on the high seas during peace. An indemnity of £3000 was paid to England on behalf of Watts and Park, but no compensation was made to the Sardinian government (*i*).

§ 124d. *The Virginius.*

Another case occurred in 1873. *The Virginius* was registered as a vessel of the United States in 1870. She then left the United States and made several voyages without returning there, but she preserved her American papers and carried the American flag when in foreign ports. In October, 1873, and while an insurrection was raging in Cuba, she cleared from Kingston, in Jamaica, with her crew and about 108 passengers. Certain arms and ammunition she had brought into Kingston were seized and forfeited under the Customs' laws, and she left that port apparently without any arms. She sailed from Kingston ostensibly for Port Limon, in Costa Rica, but in reality proceeded towards Cuba. While on the high seas and flying the American flag, she was chased by a Spanish ship of war, and being captured was carried into Santiago da Cuba. On arriving there the Spanish authorities tried the passengers and crew by court martial, and shot thirty-seven of them. Of these sixteen were British subjects. It appeared that the majority of the passengers and crew were Cubans, and that their real intention was to assist in the Cuban insurrection. But some of them, including some of the British subjects who were shot, had shipped on the supposition that *The Virginius* was going on a *bonâ fide* voyage to Costa Rica. When these executions became known, England and America promptly interfered, and called upon the Spanish government to prevent any further slaughter of their subjects. Matters became very serious between Spain and the United States, and at one time war seemed imminent. Spain, however, was willing to make reasonable concessions, and at a conference held at Washington, she agreed to restore *The Virginius* and the survivors of her passengers and crew, and to salute the United States flag, unless before the 25th December, 1873, Spain could prove to the satisfaction of the American government that *The Virginius* was not entitled to carry their flag. The ship was accordingly given up to a United States ship of war, with the survivors, but it being shown before the appointed time that *The Virginius* was not legally entitled to the American flag, the salute was dispensed with. England also demanded and obtained compensation for the families of the executed British subjects (*k*). *The Virginius* was not a pirate. She was, no doubt, on her way to assist in an insurrection, but at the time she was captured she was on the high seas, and had not as yet committed any overt acts implicating her in the revolt. Spain was entitled, perhaps, to treat her own subjects as she pleased, but the execution of foreigners found on board a foreign ship, upon the mere supposition that they were going to assist rebels, was wholly unjustifiable.

(*i*) [See Parl. Papers, 1857. Correspondence respecting *The Cagliari.* Annuaire des deux mondes, 1857—8, p. 209. Annual Reg. 1858, pp. 63—66, and p. 181].

(*k*) [See Parl. Papers. Correspondence respecting *The Virginius* (C. 991), Spain (No. 3), 1874. Annual Reg. 1873, p. 253. U. S. Dipl. Cor. 1874].

§ 124e. *The Huascar.*

One of the most curious cases has recently occurred off the coast of Peru. Pierola, an insurgent leader, seized upon the Peruvian turret ship *Huascar*, and established himself on board with all his adherents. The revolt had no basis of operation on land, and consequently could not by any possibility amount to a war. *The Huascar* cruised about the coast, and stopped several British ships, in one case demanding any despatches there might be for the Peruvian government, in another asking if there were any troops on board, in another seizing on a quantity of coal. A British subject was also detained on board and compelled to act as engineer. No actual violence was resorted to, as no resistance was in any case offered, but the demands were made by officers armed with swords and pistols. The British Admiral (*l*) commanding on the Pacific station, on hearing of these acts, called upon *The Huascar* to surrender, and offered, if this was done without resistance to land the crew at some neutral place within reasonable distance. *The Huascar* refused, and thereupon the admiral attacked her, not far from the shore, with two English wooden vessels, *The Shah* and *The Amethyst*. Great gallantry was displayed on both sides in the action, but no lives were lost. After a time *The Huascar* retired into shallow water, and an expedition was fitted out from the British ships to blow her up at night with a torpedo. She, however, eluded this, and shortly after surrendered to the Peruvian government. That government had previously disclaimed all connection with, or responsibility for, the acts of *The Huascar*. In the discussion in Parliament upon this case the Attorney-General said, "The ship had committed acts which made her an enemy of Great Britain; and that, therefore, the admiral in command of *The Shah* was justified in the course which he took. *The Huascar* was not in a position to claim belligerent rights, in that she was a ship in the hands of insurgents who had not reached a position entitling them to say that they were, or were likely to be, able to supplant the government against which they had rebelled, and to conduct the affairs of the country. As a matter of fact, *The Huascar* was simply a rover of the sea, and she had committed acts which entitled Admiral De Horsey, in command of one of Her Majesty's ships, to make war upon her." Sir W. Harcourt had asked in the House, "whether, if *The Huascar* had been taken by the admiral, he (the Attorney-General) would have advised a prosecution for piracy against the crew? In strictness they were pirates, and might have been treated as such, but it was one thing to assert that they had been guilty of acts of piracy, and another to advise that they should be tried for their lives and hanged at Newgate. This vessel, *The Huascar*, was under no commission of any sort. She was roving the seas without a commission, having been taken possession of by a mutinous crew . . . What right had *The Huascar* to stop a British merchant vessel and demand to see whether she had any despatches on board?" He concluded that the reasons given by the admiral for his acts were perfectly just and proper (*m*). The Peruvian government expressed their intention of asking

(*l*) [Rear-Admiral De Horsey].

(*m*) [See the *Times*, Aug. 13th, 1877, p. 7. And see Parl. Papers, 1877, on this subject, No. 369].

reparation from England (*n*); but as the law officers gave it as their opinion that Admiral de Horsey's proceedings were in law justifiable, and as the Lords of the Admiralty, although of opinion that it would have been better first to endeavour to obtain redress by means of remonstrances, nevertheless approved of what he did, it does not seem likely that England will accord any reparation to Peru (*o*). Nor is any due. The Peruvian government had expressly disclaimed all connection with the vessel, and refused to be responsible for her acts. Nor were they, indeed, capable of controlling her. As soon, therefore, as she had molested British commerce, there was no other course open to the British admiral, but to take the matter into his own hands.

§ 125. Slave trade whether prohibited by the law of nations.

The African slave trade, though prohibited by the municipal laws of most nations, and declared to be piracy by the statutes of Great Britain and the United States, and since the treaty of 1841, with Great Britain, by Austria, Prussia, and Russia, is not such by the general international law; and its interdiction cannot be enforced by the exercise of the ordinary right of visitation and search. That right does not exist, in time of peace, independently of special compact (*p*).

The African slave trade, once considered not only a lawful, but desirable branch of commerce, a participation in which was made the object of wars, negotiations, and treaties between different European States, is now denounced as an odious crime by the almost universal consent of nations. This branch of commerce was, in the first instance, successively prohibited by the municipal laws of Denmark, the United States, and Great Britain, to their own subjects. Its final abolition was stipulated by the treaties of Paris, Kiel, and Ghent, in 1814, confirmed by the declaration of the Congress of Vienna of the 8th of February, 1815, and reiterated by the additional article annexed to the treaty of peace concluded at Paris on the 20th November, 1815 (*q*). The accession of Spain and Portugal to the principle of the abolition was finally obtained by the treaties between Great Britain and those powers of the 23rd September, 1817, and the 22nd January, 1815. And by a convention concluded with Brazil in 1826, it was made piratical for the subjects of that country to be engaged in the trade after the year 1830.

(*n*) [Parl. Papers, 1877, Peru (No. I.), p. 18].
(*o*) [Ibid. pp. 14, 24].
(*p*) *Le Louis*, Dods. Ad. 210; *La Jeune Eugénie*, 10 Wheaton, 66.
(*q*) [See Hertslet, Map of Europe by Treaty, vol. i. pp. 60, 695].

§ 126. Treaties to suppress the slave trade.

By the treaties of the 30th November, 1831, and 22nd May, 1833, between France and Great Britain, to which nearly all the maritime powers of Europe have subsequently acceded, the mutual right of search was conceded, within certain geographical limits, as a means of suppressing the slave trade. The provisions of these treaties were extended to a wider range by the Quintuple Treaty, concluded on the 20th December, 1841, between the five great European powers, and subsequently ratified between them, except by France, which power still remained only bound by her treaties of 1831 and 1833 with Great Britain. By the treaty concluded at Washington, the 9th August, 1842, between the United States and Great Britain, referring to the 10th Article of the Treaty of Ghent, by which it had been agreed that both the contracting parties should use their best endeavours to promote the entire abolition of the traffic in slaves, it was provided, Article 8, that "the parties mutually stipulate that each shall prepare, equip, and maintain in service, on the coast of Africa, a sufficient and adequate squadron, or naval force of vessels, of suitable numbers and descriptions, to carry in all not less than eighty guns, to enforce, separately and respectively, the laws, rights, and obligations of each of the two countries, for the suppression of the slave trade, the said squadrons to be independent of each other, but the two governments stipulating, nevertheless, to give such orders to the officers commanding their respective forces, as shall enable them most effectually to act in concert and co-operation, upon mutual consultation, as exigencies may arise, for the attainment of the true object of this article; copies of all such orders to be communicated by each government to the other, respectively." By the Treaty of the 29th May, 1845, between France and Great Britain, new stipulations were entered into between the two powers, by which a joint co-operation of their naval forces on the coast of Africa, for the suppression of the slave trade, was substituted for the mutual right of search, provided by the previous treaties of 1831 and 1833.

§ 126a. Treaty of 1862 between

By a treaty concluded between England and the United States on the 7th April, 1862, it is agreed that the high contracting parties mutually consent that those ships of their respective navies, which shall be pro-

vided with special instructions, may visit such merchant vessels of the two nations as may upon reasonable grounds be suspected of having been fitted out for, or being engaged in the slave trade. This right of search is only to be exercised by authorized vessels of war, and only as regards merchant vessels; nor may it be put in force within the limits of a settlement or port, or within the territorial waters of the other party. The mode in which the search is to be conducted, and the geographical limits within which the right may be enforced, are defined by the treaty (*r*). An additional convention concluded on the 3rd June, 1870, abolished certain courts that had been established in Africa to adjudicate on vessels alleged to be slavers, and provides that suspected vessels shall be brought before the nearest Prize Court of their own country, or handed over to one of its cruisers, if one should be near the scene of capture. Instructions for the ships of each country employed in this service are annexed to the treaty (*s*).

England and the United States.

§ 127. Decisions of British and American Courts.

This general concert of nations to extinguish the traffic has given rise to the opinion, that, though once tolerated, and even protected and encouraged by the laws of every maritime country, it ought henceforth to be considered as interdicted by the international code of Europe and America. This opinion first received judicial countenance from the judgment of the Lords of Appeal in Prize Causes, pronounced in the case of an American vessel, *The Amedie*, in 1807, the trade having been previously abolished by the municipal laws of the United States and of Great Britain. The judgment of the Court was delivered by Sir William Grant, in the following terms:—

§ 128. *The Amedie.*

"This ship must be considered as being employed, at the time of capture, in carrying slaves from the coast of Africa to a Spanish colony. We think that this was evidently the original plan and purpose of the voyage, notwithstanding the pretence set up to veil the true intention. The claimant, however, who is an American, complains of the capture, and demands from us the restitution of property, of which, he alleges, that he has been unjustly dispossessed. In all the former cases of this kind which have come before this Court, the slave trade was liable to considerations very different from those which belong to it now. It had, at that time, been prohibited (so far as respected carrying slaves to the colonies of foreign nations) by America, but by our own laws it was

(*r*) [U. S. Statutes at Large, vol. xii. p. 279].
(*s*) [Ibid. vol. xvi. p. 777].

still allowed. It appeared to us, therefore, difficult to consider the prohibitory law of America in any other light than as one of those municipal regulations of a foreign State of which this Court could not take any cognizance. But by the alteration which has since taken place, the question stands on different grounds, and is open to the application of very different principles. The slave trade has since been totally abolished by this country, and our legislature has pronounced it to be contrary to the principles of justice and humanity. Whatever we might think, as individuals, before, we could not, sitting as judges in a British court of justice, regard the trade in that light while our own laws permitted it. But we can now assert that this trade cannot, abstractedly speaking, have a legitimate existence.

"When I say *abstractedly speaking*, I mean that this country has no right to control any foreign legislature that may think fit to dissent from this doctrine, and to permit to its own subjects the prosecution of this trade; but we have now a right to affirm that *primâ facie* the trade is illegal, and thus to throw on claimants the burden of proof, that, in respect of them, by the authority of their own laws, it is otherwise. As the case now stands, we think we are entitled to say that a claimant can have no right, upon principles of universal law, to claim the restitution in a Prize Court of human beings carried as slaves. He must show some right that has been violated by the capture, some property of which he has been dispossessed, to which he ought to be restored. In this case, the laws of the claimant's country allow of no property such as he claims. There can, therefore, be no right to restitution. The consequence is, that the judgment must be affirmed" (*t*).

§ 129. *The Fortuna*

In the case of *The Fortuna*, determined in 1811, in the High Court of Admiralty, Lord Stowell, in delivering the judgment of the Court, stated that an American ship, *quasi* American, was entitled, upon proof, to immediate restitution; but she might forfeit, as other neutral ships might, that title, by various acts of misconduct, by violations of belligerent rights most clearly and universally recognised. But though

(*t*) Acton's Admiralty Reports, vol. i. p. 240.

the Prize Court looked primarily to violations of belligerent rights as grounds of confiscation in vessels not actually belonging to the enemy, it had extended itself a good deal beyond considerations of that description only. It had been established by recent decisions of the Supreme Court, that the Court of Prize, though properly a court purely of the law of nations, has a right to notice the municipal law of this country *in the case of a British vessel* which, in the course of a prize-proceeding, appears to have been trading in violation of that law, and to reject a claim for her on that account. That principle had been incorporated into the prize-law of this country within the last twenty years, and seemed now fully incorporated. A late decision in the case of *The Amedie* seemed to have gone the length of establishing a principle, that any trade contrary to the general law of nations, although not tending to, or accompanied with, any infraction of the law of that country whose tribunals were called upon to consider it, might subject the vessels employed in that trade to confiscation. *The Amedie* was an American ship, employed in carrying on the slave trade; a trade which this country, *since its own abandonment of it*, had deemed repugnant to the law of nations, to justice, and humanity; though without presuming so to consider and treat it where it occurs in the practice of the subjects of a State which continued to tolerate and protect it by its own municipal regulations; but it put upon the parties the burden of showing that it was so tolerated and protected, and in failure of producing such proof, proceeded to condemnation, as it did in the case of that vessel. "How far that judgment has been universally concurred in and approved," continued Lord Stowell, "is not for me to inquire. *If there be those who disapprove of it, I certainly am not at liberty to include myself in that number, because the decisions of that court bind authoritatively the conscience of this;* its decisions must be conformed to, *and its principles practically adopted.* The principle laid down in that case appears to be, that the slave trade, carried on by a vessel belonging to a subject of the United States, is a trade which, being unprotected by the domestic regulations of their legislature and government, subjects the vessel engaged in it to a sentence of condemnation. If the ship should therefore

turn out to be an American, actually so employed—it matters not, in my opinion, in what stage of the employment, whether in the inception, or the prosecution, or the consummation of it—the case of *The Amedie* will bind the conscience of this court to the effect of compelling it to pronounce a sentence of confiscation" (*u*).

§ 130. *The Diana.* In a subsequent case, that of *The Diana*, Lord Stowell limited the application of the doctrine invented by Sir W. Grant, to the special circumstances which distinguished the case of *The Amedie*. *The Diana* was a Swedish vessel, captured by a British cruiser on the coast of Africa whilst actually engaged in carrying slaves to the Swedish West India possessions. The vessel and cargo were restored to the Swedish owner, on the ground that Sweden had not then prohibited the trade by law or convention, and still continued to tolerate it in practice. It was stated by Lord Stowell, in delivering the judgment of the High Court of Admiralty in this case, that England had abolished the trade as unjust and criminal; but she claimed no right of enforcing that prohibition against the subjects of those States which had not adopted the same opinion; and England did not mean to set herself up as the legislator and *custos morum* for the whole world, or presume to interfere with the commercial regulations of other States. The principle of the case of *The Amedie* was, that where the municipal law of the country to which the parties belonged had prohibited the trade, British tribunals would hold it to be illegal upon general principles of justice and humanity; but they would respect the property of persons engaged in it under the sanction of the laws of their own country (*x*).

The above three cases arose during the continuance of the war, and whilst the laws and treaties prohibiting the slave-trade were incidentally executed through the exercise of the belligerent right of visitation and search.

§ 131. *The Louis.* In the case of *The Diana*, Lord Stowell had sought to distinguish the circumstances of that case from those of *The Amedie*, so as to raise a distinction between the case of the subjects of a country which had already prohibited the slave-

(*u*) 1 Dods. Ad. Rep. 81.
(*x*) 1 Dods. Ad. Rep. 95.

trade, from that of those whose governments still continued to tolerate it. At last came the case of the French vessel called *The Louis*, captured after the general peace, by a British cruiser, and condemned in the inferior Court of Admiralty. Lord Stowell reversed the sentence in 1817, discarding altogether the authority of *The Amedie* as a precedent, both upon general reasoning, which went to shake that case to its very foundations, and upon the special ground, that even admitting that the trade had been actually prohibited by the municipal laws of France (which was doubtful), the right of visitation and search (being an exclusively belligerent right), could not consistently with the law of nations be exercised, in time of peace, to enforce that prohibition by the British courts upon the property of French subjects. In delivering the judgment of the High Court of Admiralty in this case, Lord Stowell held that the slave-trade, though unjust and condemned by the statute law of England, was not piracy, nor was it a crime by the universal law of nations. A court of justice, in the administration of law, must look to the legal standard of morality—a standard which, upon a question of this nature, must be found in the law of nations as fixed and evidenced by general, ancient, and admitted practice, by treaties, and by the general tenor of the laws, ordinances, and formal transactions of civilized States; and looking to these authorities, he found a difficulty in maintaining that the transaction was legally criminal. To make it piracy or a crime by the universal law of nations, it must have been so considered and treated in practice by all civilized States, or made so by virtue of a general convention.

The slave-trade, on the contrary, had been carried on by all nations, including Great Britain, until a very recent period, and was still carried on by Spain and Portugal, and not yet entirely prohibited by France. It was not, therefore, a criminal act by the consuetudinary law of nations; and every nation, independently of special compact, retained a legal right to carry it on. No nation could exercise the right of visitation and search upon the common and unappropriated parts of the ocean, except upon the belligerent claim. No one nation had a right to force its way to the liberation of Africa

by trampling on the independence of other States; or to procure an eminent good by means that are unlawful; or to press forward to a great principle by breaking through other great principles that stand in the way. The right of visitation and search on the high seas did not exist in time of peace. If it belonged to one nation it equally belonged to all, and would lead to gigantic mischief and universal war. Other nations had refused to accede to the British proposal of a reciprocal right of search in the African seas, and it would require an express convention to give the right of search in time of peace (*y*).

§ 132. *Madrazo v. Willes.*

The leading principles of this judgment were confirmed in 1820 by the Court of King's Bench, in the case of *Madrazo* v. *Willes*, in which the point of the illegality of the slave-trade, under the general law of nations, came incidentally in question. The court held that the British statutes against the slave-trade were applicable to British subjects only. The British Parliament could not prevent the subjects of other States from carrying on the trade out of the limits of the British dominions. If a ship be acting contrary to the general law of nations, she is thereby subject to condemnation; but it was impossible to say that the slave-trade is contrary to the law of nations. It was, until lately, carried on by all the nations of Europe; and a practice so sanctioned could only be rendered illegal on the principles of international law, by the consent of all the powers. Many States had so consented, but others had not; and the adjudged cases had gone no farther than to establish the rule, that ships belonging to countries that had prohibited the trade were liable to capture and condemnation, if found engaged in it (*z*).

§ 132a. *Buron v. Denman.*

The subsequent case of *Buron* v. *Denman* (*a*), places the matter in a still clearer light. A treaty was entered into between Commander Denman, of H.M.S. *Wanderer*, and King Sciacca, the Sovereign of Gallinas, a territory near Sierra Leone, for the abolition of slavery in his dominions. Acting upon this treaty, Commander Denman destroyed certain barracoons of the slave dealers, and liberated the slaves, whom

(*y*) 2 Dods. Ad. Rep. 210.

(*z*) 3 Barn. & Ald. 353. [See also *Santos* v. *Illidge*, 6 C. B. N. S. 841; 29 L. J. C. P. 348; *R.* v. *Zulueta*, 1 C. & K. 215; *Pinner* v. *Arnold*, C. M. & R. 613; *Esposito* v. *Bowden*, 7 E. & B. 763].

(*a*) [3 Exch. 167; and see *Forbes* v. *Cochrane*, 2 B. & C. 448].

he conveyed to Sierra Leone. Some of these slaves belonged to Buron, the plaintiff. Baron Parke, in summing up, directed the jury, that the proceedings of Commander Denman, at the time of their execution, had been wrongful, and would have entitled the plaintiff to recover for the loss of his goods and slaves, were it not that the defendant had acted under the authority of a political treaty, which had been subsequently ratified by the Home Government, whereby his acts had become acts of State, for which the Government, and not its officer, was responsible.

These cases establish beyond controversy, that the tribunals of England recognize the right of property of the owner in the slave, so long as the slave is in the country by the law of which the owner's right is upheld (*b*). It has also been held in a recent case in the supreme court of the United States, that a promissory note given as the price of slaves in a State where slavery was at the time lawful, could be enforced after the abolition of slavery throughout the Union (*c*).

§ 133. *The Antelope.*

A similar course of reasoning was adopted by the supreme court of the United States in the case of Spanish and Portuguese vessels captured by American cruisers whilst the trade was still tolerated by the laws of Spain and Portugal. It was stated, in the judgment of the court, that it could hardly be denied that the slave-trade was contrary to the law of nature. That every man had a natural right to the fruits of his own labour, was generally admitted; and that no other person could rightfully deprive him of those fruits, and appropriate them against his will, seemed to be the necessary result of this admission. But, from the earliest times, war had existed, and war conferred rights in which all had acquiesced. Among the most enlightened nations of antiquity, one of these rights was, that the victor might enslave the vanquished. That which was the usage of all nations could not be pronounced repugnant to the law of nations, which was certainly to be tried by the test of general usage. That which had received the assent of all must be the law of all.

Slavery, then, had its origin in force; but as the world had agreed that it was a legitimate result of force, the state of things which was thus produced by general consent could not be pronounced unlawful.

Throughout Christendom this harsh rule had been exploded, and war was no longer considered as giving a right to enslave captives. But this triumph had not been universal.

(*b*) [Report of Commission on Fugitive Slaves, 1875, p. 54].
(*c*) [*Boyce* v. *Tabb*, 18 Wallace, 546].

The parties to the modern law of nations do not propagate their principles by force; and Africa had not yet adopted them. Throughout the whole extent of that immense continent, so far as we know its history, it is still the law of nations that prisoners are slaves. The question then was could those who had renounced this law be permitted to participate in its effects by purchasing the human beings who are its victims?

Whatever might be the answer of a moralist to this question, a jurist must search for its legal solution in those principles which are sanctioned by the usages, the national acts, and the general assent, of that portion of the world of which he considers himself a part, and to whose law the appeal is made. If we resort to this standard as the test of international law, the question must be considered as decided in favour of the legality of the trade. Both Europe and America embarked in it; and for nearly two centuries it was carried on without opposition and without censure. A jurist could not say that a practice thus supported was illegal, and that those engaged in it might be punished, either personally or by deprivation of property.

In this commerce, thus sanctioned by universal assent, every nation had an equal right to engage. No principle of general law was more universally acknowledged than the perfect equality of nations. Russia and Geneva have equal rights. It results from this equality, that no one can rightfully impose a rule on another. Each legislates for itself, but its legislation can operate on itself alone. A right, then, which was vested in all by the consent of all, could be divested only by consent; and this trade, in which all had participated, must remain lawful to those who could not be induced to relinquish it. As no nation could prescribe a rule for others, no one could make a law of nations; and this traffic remained lawful to those whose governments had not forbidden it.

If it was consistent with the law of nations, it could not in itself be piracy. It could be made so only by statute; and the obligation of the statute could not transcend the legislative power of the State which might enact it.

If the trade was neither repugnant to the law of nations,

nor piratical, it was almost superfluous to say in that court that the right of bringing in for adjudication in time of peace, even where the vessel belonged to a nation which had prohibited the trade, could not exist. The courts of justice of no country executed the penal laws of another; and the course of policy of the American government on the subject of visitation and search, would decide any case against the captors in which that right had been exercised by an American cruiser, on the vessel of a foreign nation not violating the municipal laws of the United States. It followed that a foreign vessel engaged in the African slave-trade, captured on the high seas in time of peace, by an American cruiser, and brought in for adjudication, would be restored to the original owners (*d*).

§ 133a. Fugitive slaves.

Another question of great difficulty with regard to slaves is that of their position after quitting a country where they are held in bondage, and then returning to it. No one will deny that a slave is justified in escaping from his master, if he can do so without having recourse to violence, and no country would give him up to his owner in such a case. It has, however, been asserted, that when a slave has once set foot on British soil, he becomes at once and for ever a free man, and that his owner's rights thereupon cease to exist. Such a position cannot be supported. The law of England recognizes the right of an owner in a slave-owning State over his slaves, and therefore British law cannot impress the quality of freedom upon a slave who has violated his master's right, so as to make the slave able to continue free on his return to the owner's country. In a case decided by Lord Stowell, Grace, a slave in Antigua, accompanied her mistress to England, and then returned with her to Antigua. She was there seized by the waiter of the Customs, as forfeited for having been imported into the island, contrary to a statute prohibiting the further importation of slaves. Her owner put in a claim for her, and Lord Stowell decided in his favour, on the ground that while in England she was free, but that her liberty had been placed "into a sort of parenthesis," and as she had returned to Antigua, her owner's rights over her revived, and he was therefore entitled to her (*e*). Lord Chief Justice Cockburn has recently expressed his approval of this decision (*f*); and the same principle is to be found in other cases (*g*). Mr. Justice Story has also expressed his concurrence with this judgment (*h*), and the decisions of the American courts are to the same effect (*i*).

Case of the slave *Grace*.

(*d*) *The Antelope*, 10 Wheaton, 66. [See *The Slavers*, 2 Wallace, 350].
(*e*) [*The Slave Grace*, 2 Hagg. Ad. 131].
(*f*) [See Report on Fugitive Slaves, 1875, p. xlviii.].
(*g*) [*Forbes* v. *Cochrane*, 2 B. & C. 448; *Williams* v. *Brown*, 3 Bos. & Pul. 69].
(*h*) [Life of Story, vol. i. p. 552].
(*i*) [*Strader* v. *Graham*, 10 Howard, 52; *Dred Scot* v. *Sandford*, 19 Howard, 393].

§ 133b. Slaves escaping to ships of war.

The mode in which the question is most likely to present itself at the present time, is by slaves escaping on to the ships of war of foreign States. To give back a slave to his master, knowing that he will be maltreated, and made to suffer for having attempted to regain his liberty, is repugnant to the feelings of human nature; and yet to protect him and carry him off to some country where slavery does not exist, is a violation of his owner's rights. The instructions of the Admiralty to the commanders of British ships of war, recommend that as a rule fugitive slaves should not be received on board, but the commanders are instructed that "In any case in which you have received a fugitive slave into your ship, and taken him under the protection of the British flag, whether within or beyond the territorial waters of any State, you will not admit or entertain any demand made upon you for his surrender, on the ground of slavery.

British Admiralty instructions.

"No rule is, or can be laid down, as to when a fugitive is to be received on board or not" (*k*).

Opinion of Sir J. Stephen.

Sir James Stephen has come to the conclusion, "That commanding officers of British ships of war in territorial waters are under an obligation, imposed by international law, to deliver up fugitive slaves who have taken refuge on board their ships when required to do so by the local authorities, in accordance with the local law. That the law of England does not forbid them to discharge this obligation. That it is doubtful whether by refusing to discharge it, they might not incur a personal responsibility to the owner of the slave. That the privilege of exterritoriality (whatever may be its exact nature and extent), is really irrelevant to the subject" (*l*).

§ 133c. Slavery in the United States.

While slavery existed in some of the States of the American Union, it was held by the supreme court, that laws made by any of the States to prevent, or even to assist, the arrest of fugitive slaves, were unconstitutional and void (*m*). However, the civil war resulted in the total abolition of slavery throughout the Union. The Thirteenth Amendment to the Constitution provides that, 1. "Neither slavery nor involuntary servitude, except as a punishment for crime, whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

"2. Congress shall have power to enforce this article by appropriate legislation" (*n*).

§ 134. Extent of the judicial power as to property within the territory.

II. The judicial power of every State extends to all civil proceedings, *in rem*, relating to real or personal property within the territory.

This follows, in respect to real property, as a necessary consequence of the rule relating to the application of the *lex*

(*k*) [Solicitor's Journal, vol. xx. p. 833. The subject is fully considered in the Report of the Royal Commission on Fugitive Slaves, 1875].

(*l*) [Report on Fugitive Slaves, 1875, p. lxi.]

(*m*) [*Prigg* v. *Pennsylvania*, 16 Peters, 539, 622].

(*n*) [Thirteenth Amendment to the Constitution of the U. S. See *Memor* v. *Happersett*, 21 Wallace, 162].

loci rei sitæ. As every thing relating to the tenure, title, and transfer of real property (*immobilia*) is regulated by the local law, so also the proceedings in courts of justice relating to that species of property, such as the rules of evidence and of prescription, the forms of action and pleadings must necessarily be governed by the same law (*o*).

§ 135. Distinction between the rule of decision and the rule of procedure as affecting cases *in rem.*

A similar rule applies to all civil proceedings *in rem*, respecting personal property (*mobilia*) within the territory, which must also be regulated by the local law, with this qualification, that foreign laws may furnish the rule of decision in cases where they apply, whilst the forms of process, and rules of evidence and prescription are still governed by the *lex fori.* Thus the *lex domicilii* forms the law in respect to a testament of personal property or succession *ab intestato*, if the will is made, or the party on whom the succession devolves resides, in a foreign country; whilst at the same time the *lex fori* of the State in whose tribunals the suit is pending determines the forms of process and the rules of evidence and prescription.

§ 136. Succession to personal property *ab intestato.*

Though the distribution of the personal effects of an intestate is to be made according to the law of the place where the deceased was domiciled, it does not therefore follow that the distribution is in all cases to be made by the tribunals of that place to the exclusion of those of the country where the property is situate. Whether the tribunal of the State where the property lies is to decree distribution, or to remit the property abroad, is a matter of judicial discretion to be exercised according to the circumstances. It is the duty of every government to protect its own citizens in the recovery of their debts and other just claims; and in the case of a solvent estate it would be an unreasonable and useless comity to send the funds abroad, and the resident creditor after them. But if the estate be insolvent, it ought not to be sequestered for the exclusive benefit of the subjects of the State where it lies. In all civilized countries, foreigners, in such a case, are entitled to prove their debts and share in the distribution (*p*).

(*o*) Vide *supra*, § 81.
(*p*) Kent's Commentaries on American Law (5th ed.), vol. ii. pp. 431, 432, and the cases there cited.

§ 137. Foreign will, how carried into effect in another country.

Though the forms in which a testament of personal property made in a foreign country is to be executed are regulated by the local law, such a testament cannot be carried into effect in the State where the property lies, until, in the language of the law of England, *probate* has been obtained in the proper tribunal of such State, or, in the language of the civilians, it has been *homologated*, or registered, in such tribunal (*q*).

So also a foreign executor, constituted such by the will of the testator, cannot exercise his authority in another State without taking out letters of administration in the proper local court. Nor can the administrator of a succession *ab intestato*, appointed *ex officio* under the laws of a foreign State, interfere with the personal property in another State belonging to the succession, without having his authority confirmed by the local tribunal.

§ 137a. Probate of wills in England.

If the testator died without leaving any personal property in England, generally speaking, his will need not be proved in any Court of Probate in England (*r*). But if a foreign executor should find it necessary to institute a suit in this country, to recover a debt due to his testator, he must then prove the will here, or a personal representative must be constituted by the Court of Probate here to administer *ad litem* (*s*). The English Court of Probate generally follows the decision of the foreign court, when a will proved abroad also requires probate in England. The court should, however, be satisfied, either that the will was valid by the law of the testator's domicile, or that a court of the foreign country has acted upon it, and given it efficiency (*t*).

§ 138. Conclusiveness of foreign sentences

The judgment or sentence of a foreign tribunal of competent jurisdiction proceeding *in rem*, such as the sentences of Prize Courts under the law of nations, or Admiralty and Exchequer, or other revenue courts, under the municipal law, are conclusive as to the proprietary interest in, and title to, the thing in question, wherever the same comes incidentally in controversy in another State.

(*q*) *Armstrong* v. *Lear*, 12 Wheaton, p. 169. Code Civil, liv. iii. tit. 2, art. 1000.

(*r*) [Williams on Executors (7th ed.), p. 360; *Jauncey* v. *Sealey*, 1 Vernon, 397].

(*s*) [Williams on Executors, p. 361. *Attorney-General* v. *Bowens*, 4 M. & W. 193; *Price* v. *Dewhurste*, 4 M. & Cr. 80].

(*t*) [Williams on Executors, p. 362. *In the goods of Des Hais*, 34 L. J. P. M. & A. 58. With regard to the Probate in England of Scotch and Irish wills, see 21 & 22 Vict. c. 56, s. 12; 20 & 21 Vict. c. 79, s. 95].

Whatever doubts may exist as to the conclusiveness of foreign sentences in respect of facts collaterally involved in the judgment, the peace of the civilized world, and the general security and convenience of commerce, obviously require that full and complete effect should be given to such sentences, wherever the title to the specific property, which has been once determined in a competent tribunal, is again drawn in question in any other court or country.

§ 138a. English and American decisions.

The English courts endeavour to uphold all decisions of foreign tribunals, when such decisions have been rightly obtained. Mr. Justice Story lays down the rule as regards foreign judgments *in rem* in very explicit terms. He says the judgment is conclusive "when there have been proceedings *in rem* as to movable property within the jurisdiction of the court pronouncing the judgment (*u*). Whatever it settles as to the right or title, or whatever disposition it makes of the property by sale, revendication, transfer, or other act, will be held valid in every other country where the question comes directly or indirectly in judgment before any other foreign tribunal. But this doctrine, however, is always to be understood with this limitation, that the judgment has been obtained *bonâ fide* and without fraud; for if fraud has intervened, it will doubtless avoid the force and validity of the sentence (*x*). So it must appear that there have been regular proceedings to found the judgment or decree; and that the parties in interest *in rem* have had notice or an opportunity to appear and defend their interests, either personally or by their proper representatives, before it was pronounced; for the common justice of all nations requires that no condemnation should be pronounced before the party has an opportunity to be heard" (*y*). "We think the inquiry is," said Mr. Justice Blackburn, in giving an opinion in the House of Lords (*z*), "first, whether the subject-matter was so situated as to be within the lawful control of the State, under the authority of which the court sits; and, secondly, whether the sovereign authority of that State has conferred on the court jurisdiction to decide as to the disposition of the thing, and the court has acted within its jurisdiction. If these conditions are fulfilled, the adjudication is conclusive against all the world." The judgment is binding even though it appears that the foreign court based its decision on a mistaken idea of English law (*a*).

§ 139. Transfer of property under fo-

How far a bankruptcy declared under the laws of one country will affect the real and personal property of the bankrupt situate in another State, is a question of which the usage

(*u*) [*Rose* v. *Himely*, 4 Cranch, 241].
(*x*) [*Williams* v. *Amroyd*, 7 Cranch, 423].
(*y*) [Story, Conflict of Laws, § 592. Boyd, The Merchant Shipping Laws, p. 459. *Monroe* v. *Douglas*, 4 Sandford, 123; *Sawyer* v. *Maine Fire Ins. Co.*, 12 Massachusetts, 291; *Colliss* v. *Hector*, L. R. 19 Eq. 334].
(*z*) [*Castrique* v. *Imrie*, L. R. 4 H. L. 429].
(*a*) [Ibid., p. 414].

reign bankrupt proceedings.

of nations, and the opinions of civilians, furnish no satisfactory solution. Even as between co-ordinate States, belonging to the same common empire, it has been doubted how far the assignment under the bankrupt laws of one country will operate a transfer of property in another. In respect to real property, which generally has some indelible characteristics impressed upon it by the local law, these difficulties are enhanced in those cases where the *lex loci rei sitæ* requires some formal act to be done by the bankrupt, or his attorney, specially constituted, in the place where the property lies, in order to consummate the transfer. In those countries where the theory of the English bankrupt system, that the assignment transfers all the property of the bankrupt, wherever situate, is admitted in practice, the local tribunals would probably be ancillary to the execution of the assignment by compelling the bankrupt, or his attorney, to execute such formal acts as are required by the local laws to complete the conveyance (*b*).

The practice of the English Court of Chancery in assuming jurisdiction incidentally of questions affecting the title to lands in the British colonies, in the exercise of its jurisdiction *in personam*, where the party resides in England, and thus compelling him, indirectly, to give effect to its decrees as to real property situate out of its local jurisdiction, seems very questionable on principle, unless where it is restrained to the case of a party who has fraudulently obtained an undue advantage over other creditors by judicial proceedings instituted without personal notice to the defendant.

But whatever effect may, in general, be attributed to the assignment in bankruptcy as to property situate in another State, it is evident that it cannot operate where one creditor has fairly obtained by legal diligence a specific lien and right of preference, under the laws of the country where the property is situate (*c*).

§ 140. Extent of the judicial power over

III. The judicial power of every State may be extended to all controversies respecting personal rights and contracts, or injuries to the person or property, when the party resides

(*b*) See Lord Eldon's observations in *Selkrigg* v. *Davis*, Rose's Cases in Bankruptcy, vol. ii. p. 311; *Banfield* v. *Solomon*, 9 Vesey, 77.

(*c*) Kent's Comment. on American Law, vol. ii. pp. 405—408, 5th ed.

within the territory, wherever the cause of action may have originated.

foreigners residing within the territory.

This general principle is entirely independent of the rule of decision which is to govern the tribunal. The rule of decision may be the law of the country where the judge is sitting, or it may be the law of a foreign State in cases where it applies; but that does not affect the question of jurisdiction, which depends, or may be made to depend, exclusively upon the residence of the party.

Depends upon municipal regulations.

The operation of the general rule of international law, as to civil jurisdiction, extending to all persons who owe even a temporary allegiance to the State, may be limited by the positive institutions of any particular country. It is the duty, as well as the right, of every nation to administer justice to its own citizens; but there is no uniform and constant practice of nations, as to taking cognizance of controversies between foreigners. It may be assumed or declined, at the discretion of each State, guided by such motives as may influence its juridical policy. All real and possessory actions may be brought, and indeed must be brought, in the place where the property lies; but the law of England, and of other countries where the English common law forms the basis of the local jurisprudence, considers all personal actions, whether arising *ex delicto* or *ex contractu*, as transitory; and permits them to be brought in the domestic forum, whoever may be the parties, and wherever the cause of action may originate. This rule is supported by a legal fiction, which supposes the injury to have been inflicted, or the contract to have been made, within the local jurisdiction. In the countries which have modelled their municipal jurisprudence upon the Roman civil law, the maxim of that code, *actor sequitur forum rei*, is generally followed, and personal actions must therefore be brought in the tribunals of the place where the defendant has acquired a fixed domicile.

Law of England and America.

§ 141. French law.

By the law of France, foreigners who have established their domicile in the country by special license (*autorisation*) of the king, are entitled to all civil rights, and, among others, to that of suing in the local tribunals as French subjects. Under other circumstances, these tribunals have jurisdiction where foreigners are parties in the following cases only:—

1. Where the contract is made in France, or elsewhere, between foreigners and French subjects.

2. In commercial matters, on all contracts made in France, with whomsoever made, where the parties have elected a domicile, in which they are liable to be sued, either by the express terms of the contract, or by necessary implication resulting from its nature.

3. Where foreigners voluntarily submit their controversies to the decision of the French tribunals, by waving a plea to the jurisdiction.

In all other cases, where foreigners not domiciled in France by special license of the king are concerned, the French tribunals decline jurisdiction, even when the contract is made in France (*d*).

A late excellent writer on private international law considers this jurisprudence, which deprives a foreigner, not domiciled in France, of the faculty of bringing a suit in the French tribunals against another foreigner, as inconsistent with the European law of nations. The Roman law had recognized the principle, that all contracts the most usual among men arise from the law of nations, *ex jure gentium;* in other words, these contracts are valid, whether made between foreigners, or between foreigners and citizens, or between citizens of the same State. This principle has been incorporated into the modern law of nations, which recognizes the right of foreigners to contract within the territorial limits of another State. This right necessarily draws after it the authority of the local tribunals to enforce the contracts thus made, whether the suit is brought by foreigners or by citizens (*e*).

§ 142. Proceedings against absent parties.

The practice which prevails in some countries, of proceeding against absent parties, who are not only foreigners, but have not acquired a domicile within the territory, by means of some formal public notice, like that of the *viis et modis* of the Roman civil law, without actual personal notice of the suit, cannot be reconciled with the principles of international jus-

(*d*) Code Civil, art. 13, 14, 15. Code de Commerce, art. 631. Discussions sur le Code Civil, tom. i. p. 48. Pothier, Procédure Civile, partie i. ch. 1, p. 2. Valin, sur l'Ord. de la Marine, tom. i. pp. 113, 253, 254. Pardessus, Droit Commercial, Pt. VI. tit. 7, ch. 1, § 1.

(*e*) Fœlix, Droit International Privé, §§ 122, 123.

tice. So far, indeed, as it merely affects the specific property of the absent debtor within the territory, attaching it for the benefit of a particular creditor, who is thus permitted to gain a preference by superior diligence, or for the general benefit of all the creditors who come in within a certain fixed period, and claim the benefit of a rateable distribution, such a practice may be tolerated; and in the administration of international bankrupt law it is frequently allowed to give a preference to the attaching creditor, against the law of what is termed the *locus concursûs creditorum*, which is the place of the debtor's domicile (*f*).

§ 143. Distinction between the rule of decision and rule of proceeding, in cases of contract.

Where the tribunal has jurisdiction, the rule of decision is the law applicable to the case, whether it be the municipal or a foreign code; but the rule of proceeding is generally determined by the *lex fori* of the place where the suit is pending. But it is not always easy to distinguish the rule of decision from the rule of proceeding. It may, however, be stated in general, that whatever belongs to the obligation of the contract is regulated by the *lex domicilii*, or the *lex loci contractus*, and whatever belongs to the remedy for enforcing the contract is regulated by the *lex fori*.

If the tribunal is called upon to apply to the case the law of the country where it sits, as between persons domiciled in that country, no difficulty can possibly arise. As the obligation of the contract and the remedy to enforce it are both derived from the municipal law, the rule of decision and the rule of proceeding must be sought in the same code. In other cases it is necessary to distinguish with accuracy between the obligation and the remedy.

The obligation of the contract, then, may be said to consist of the following parts:—

1. The personal capacity of the parties to contract.
2. The will of the parties expressed, as to the terms and conditions of the contract.
3. The external form of the contract.

The personal capacity of parties to contract depends upon those personal qualities which are annexed to their civil condition, by the municipal law of their own State, and which travel with them wherever they go, and attach to them in

(*f*) [*Schibsly* v. *Westenholz*, L. R. 6 Q. B. 155].

whatever foreign country they are temporarily resident. Such are the privileges and disabilities conferred by the *lex domicilii* in respect to majority and minority, marriage and divorce, sanity or lunacy, and which determine the capacity or incapacity of parties to contract, independently of the law of the place where the contract is made, or that of the place where it is sought to be enforced.

It is only those universal personal qualities, which the laws of all civilized nations concur in considering as essentially affecting the capacity to contract, which are exclusively regulated by the *lex domicilii*, and not those particular prohibitions or disabilities, which are arbitrary in their nature and founded upon local policy; such as the prohibition in some countries, of noblemen and ecclesiastics from engaging in trade and forming commercial contracts. The qualities of a major or minor, of a married or single woman, &c., are universal personal qualities, which, with all the incidents belonging to them, are ascertained by the *lex domicilii*, but which are also everywhere recognized as forming essential ingredients in the capacity to contract (*g*).

§ 144. Bankruptcy.

How far bankruptcy ought to be considered as a privilege or disability of this nature, and thus be restricted in its operation to the territory of that State under whose bankrupt code the proceedings take place, is, as already stated, a question of difficulty in respect to which no constant and uniform usage prevails among nations. Supposing the bankrupt code of any country to form a part of the obligation of every contract made in that country with its citizens, and that every such contract is subject to the implied condition, that the debtor may be discharged from his obligation in the manner prescribed by the bankrupt laws, it would seem, on principle, that a certificate of discharge ought to be effectual in the tribunals of any other State where the creditor may bring his suit. If, on the other hand, the bankrupt code merely forms a part of the remedy for a breach of the contract, it belongs to the *lex fori*, which cannot operate extra-territorially within the jurisdiction of any other State having the exclusive right of regulating the proceedings in its own courts of justice; still less can it have such an operation where it is a mere partial

(*g*) Pardessus, Droit Commercial, Pt. VI. tit. 7, ch. 2, § 1.

modification of the remedy, such as an exemption from arrest, and imprisonment of the debtor's person on a *cessio bonorum*. Such an exemption being strictly local in its nature, and to be administered, in all its details, by the tribunals of the State creating it, cannot form a law for those of any foreign State. But if the exemption from arrest and imprisonment, instead of being merely contingent upon the failure of the debtor, to perform his obligation through insolvency, enters into and forms an essential ingredient in the original contract itself, by the law of the country where it is made, it cannot be enforced in any other State by the prohibited means. Thus by the law of France, and other countries where the *contrainte par corps* is limited to commercial debts, an ordinary debt contracted in that country by its subjects cannot be enforced by means of personal arrest in any other State, although the *lex fori* may authorise imprisonment for every description of debts (*h*).

§ 144a. Remedy for wrongs committed in a foreign country.

There is no doubt of the general rule that when an action is brought in one country for acts which have taken place in another, the rights and merits of the case are to be decided by the law of the place where the acts occurred. There is, however, a limitation to the rule when the case is one, not of contract, but of tort. The civil liability arising out of a wrong derives its birth from the law of the place where the wrong was committed, and its character is determined by that law; but in order that a wrong committed abroad should give a remedy in England, it is essential that the wrong should be of such a character that it would give a cause of action if committed in England (*i*). Thus a collision occurred in the Scheldt between a British ship and a Norwegian barque, in which the latter was damaged by the fault of the British ship. By the law of Belgium, the British ship was compelled to take a pilot on board while navigating the Scheldt, but, though the pilotage was compulsory, the law of Belgium did not free the master from responsibility while the ship was in the pilot's charge. By the law of England, a master is not responsible for damage occasioned by the fault or incapacity of a qualified pilot, when the employment of such a pilot is compulsory by law (*k*). It being proved that the collision occurred through the fault of the pilot on board the British ship, the Privy Council refused to hold the owner liable in England, although he might be so in Belgium (*l*).

(*h*) *Melan* v. *The Duke of Fitz-James*, 1 B. & P. 131.

(*i*) [*The Halley*, L. R. 2 P. C. 193; *Phillips* v. *Eyre*, L. R. 6 Q. B. 28; *The M. Moxham*, 1 P. D. 111].

(*k*) [17 & 18 Vict. c. 104, s. 388. See Boyd, The Merchant Shipping Laws, p. 345].

(*l*) [*The Halley*, L. R. 2 P. C. 193. See also *Smith* v. *Condry*, 1 Howard, 28, where similar principles were applied in America].

§ 145. Obligation of a contract.

The obligation of the contract consists of the will of the parties, expressed as to its terms and conditions.

The interpretation of these depends, of course, upon the *lex loci contractus*, as do also the nature and extent of those implied conditions which are annexed to the contract by the local law or usage. Thus the rate of interest, unless fixed by the parties, is allowed by the law as damages for the detention of the debt, and the proceedings to recover these damages may strictly be considered as a part of the remedy. The rate of interest is, however, regulated by the law of the place where the contract is made, unless, indeed, it appears that the parties had in view the law of some other country. In that case, the lawful rate of interest of the place of payment, or to which the loan has reference, by security being taken upon property there situate, will control the *lex loci contractus* (*m*).

§ 146. Form of a contract.

The external form of the contract constitutes an essential part of its obligation.

This must be regulated by the law of the place of contract, which determines whether it must be in writing, or under seal, or executed with certain formalities before a notary, or other public officer, and how attested. A want of compliance with these requisites renders the contract void *ab initio*, and being void by the law of the place, it cannot be carried into effect in any other State. But a mere fiscal regulation does not operate extra-territorially; and therefore the want of a stamp, required by the local law to be impressed on an instrument, cannot be objected where it is sought to be enforced in the tribunals of another country.

There is an essential difference between the form of the contract and the extrinsic evidence by which the contract is to be proved. Thus the *lex loci contractus* may require certain contracts to be in writing, and attested in a particular manner, and a want of compliance with these forms will render them entirely void. But if these forms are actually complied with, the extrinsic evidence by which the existence and terms of the contract are to be proved in a foreign tribunal, is regulated by the *lex fori*.

§ 147. Conclusive-

The most eminent public jurists concur in asserting the

(*m*) Kent's Comm. on American Law, vol. ii. p. 459, 5th edit. Fœlix, Droit International Privé, § 85.

principle, that a final judgment, rendered in a personal action, in the courts of competent jurisdiction of one State, ought to have the conclusive effect of a *res adjudicata* in every other State, wherever it is pleaded in bar of another action for the same cause (*n*).

ness of foreign judgments in personal actions.

But no sovereign is bound, unless by special compact, to execute within his dominions a judgment rendered by the tribunals of another State; and if execution be sought by suit upon the judgment, or otherwise, the tribunal in which the suit is brought, or from which execution is sought, is, on principle, at liberty to examine into the merits of such judgment, and to give effect to it or not, as may be found just and equitable (*o*). The general comity, utility, and convenience of nations have, however, established a usage among most civilized States, by which the final judgments of foreign courts of competent jurisdiction are reciprocally carried into execution, under certain regulations and restrictions, which differ in different countries (*p*).

§ 148. English law as to foreign judgments.

By the law of England, the judgment of a foreign tribunal, of competent jurisdiction, is conclusive where the same matter comes incidentally in controversy between the same parties; and full effect is given to the *exceptio rei judicatæ*, where it is pleaded in bar of a new suit for the same cause of action. A foreign judgment is *primâ facie* evidence, where the party claiming the benefit of it applies to the English courts to enforce it, and it lies on the defendant to impeach the justice of it, or to show that it was irregularly obtained. If this is not shown, it is received as evidence of a debt, for which a new judgment is rendered in the English court, and execution awarded. But if it appears by the record of the proceedings, on which the original judgment was founded, that it was unjustly or fraudulently obtained, without actual personal notice to the party affected by it; or if it is clearly and unequivocally shown, by extrinsic evidence, that the judgment has manifestly proceeded upon false premises or inadequate reasons, or upon a palpable mistake of local or

(*n*) Vattel, liv. ii. ch. vii. §§ 84, 85. Martens, Droit des Gens, §§ 93, 94, 95. Klüber, Droit des Gens, § 59. Deutsche Bundes Recht, § 366.
(*o*) Kent's Comm., vol. ii. p. 119, 5th edit.
(*p*) Fœlix, §§ 292–311.

foreign law; it will not be enforced by the English tribunals (*q*).

§ 149. American law.

The same jurisprudence prevails in the United States of America, in respect to judgments and decrees rendered by the tribunals of a State foreign to the Union. As between the different States of the Union itself, a judgment obtained in one State has the same credit and effect in all the other States, which it has by the laws of that State where it was obtained; that is, it has the conclusive effect of a domestic judgment (*r*).

§ 150. Law of France.

The law of France restrains the operation of foreign judgments within narrower limits. Judgments obtained in a foreign country against French subjects are not conclusive, either where the same matter comes again incidentally in controversy, or where a direct suit is brought to enforce the judgment in the French tribunals. And this want of comity is even carried so far, that, where a French subject commences a suit in a foreign tribunal, and judgment is rendered against him, the exception of *lis finita* is not admitted as a bar to a new action by the same party, in the tribunals of his own country. If the judgment in question has been obtained against a foreigner, subject to the jurisdiction of the tribunal where it was pronounced, it is conclusive in bar of a new action in the French tribunals, between the same parties. But the party who seeks to enforce it must bring a new suit upon it, in which the judgment is *primâ facie* evidence only; the defendant being permitted to contest the merits, and to show not only that it was irregularly obtained, but that it is unjust and illegal (*s*).

The execution of foreign judgments *in personam* is reciprocally allowed, by the law and usage of the different States of the Germanic Confederation, and of the European continent in general, except Spain, Portugal, Russia, Sweden, Norway,

(*q*) *Frankland* v. *McGusty*, 1 Knapp, P. C. 274; *Novelli* v. *Rossi*, 2 Barn. & Adol. 757; *Becquet* v. *M'Carthy*, 3 ib. 951. [*Godard* v. *Gray*, L. R. 6 Q. B. 139; *Ochsenbein* v. *Papelier*, L. R. 8 Ch. Ap. 695; *Messina* v. *Petrococchino*, L. R. 4 P. C. 144.]

(*r*) *Mills* v. *Duryee*, 7 Cranch, pp. 481—484; *Hampton* v. *M'Connel*, 3 Wheaton, 234.

(*s*) Code Civil, art. 2123, 2128. Code de Procédure Civil, art. 546. Pardessus, Droit Commercial, Pt. VI. tit. 7, ch. 2, § 2, No. 1488. Merlin, Répertoire, tom. vi. tit. *Jugement*. Questions de Droit, tom. iii. tit. *Jugement*. Toullier, Droit Civil Français, tom. x. Nos. 76—86.

France, and the countries whose legislation is based on the French civil code (*t*).

§ 151. Foreign divorces.

A decree of divorce obtained in a foreign country, by a fraudulent evasion of the laws of the State to which the parties belong, would seem, on principle, to be clearly void in the country of their domicile, where the marriage took place, though valid under the laws of the country where the divorce was obtained. Such are divorces obtained by parties going into another country for the sole purpose of obtaining a dissolution of the nuptial contract, for causes not allowed by the laws of their own country, or where those laws do not permit a divorce *à vinculo* for any cause whatever. This subject has been thrown into almost inextricable confusion, by the contrariety of decisions between the tribunals of England and Scotland; the courts of the former refusing to recognise divorces *à vinculo* pronounced by the Scottish tribunals, between English subjects who had not acquired a *bonâ fide* permanent domicile in Scotland; whilst the Scottish courts persist in granting such divorces in cases where, by the law of England, Ireland, and the colonies connected with the United Kingdom, the authority of parliament alone is competent to dissolve the marriage, so as to enable either party, during the lifetime of the other, again to contract lawful wedlock (*u*).

In the most recent English decision on this subject, the House of Lords, sitting as a Court of Appeals in a case coming from Scotland, and considering itself bound to administer the law of Scotland, determined that the Scottish courts had, by the law of that country, a rightful jurisdiction to decree a divorce between parties actually domiciled in Scotland, notwithstanding the marriage was contracted in England. But the Court did not decide what effect such a divorce would have, if brought directly in question in an English court of justice (*x*).

In the United States, the rule appears to be conclusively settled that the *lex loci* of the State in which the parties are *bonâ fide* domiciled, gives jurisdiction to the local courts to

(*t*) Fœlix, Droit International Privé, §§ 293—311.

(*u*) Dow's Parliament. Cases, vol. i. p. 117; *Tovey* v. *Lindsay*, p. 124. *Lolly's case*, 2 Clark & Fin. 567. See Fergusson's Reports of Decisions in the Consistorial Courts of Scotland, *passim*.

(*x*) *Warrender* v. *Warrender*, 9 Bligh, 89; S. C. 2 Clark & Fin. 488.

decree a divorce, for any cause recognised as sufficient by the local law, without regard to the law of that State where the marriage was originally contracted (*y*). This, of course, excludes such divorces as are obtained in fraudulent evasion of the laws of one State, by parties removing into another for the sole purpose of procuring a divorce (*z*).

§ 151a. Validity of a foreign divorce in England.

When two persons have been married in England and are afterwards divorced abroad, the validity of this divorce in England will depend upon three considerations. (1) The divorce must have been pronounced upon grounds which would be sufficient to enable an English court to divorce the parties. (2) The parties must be domiciled in the country whose courts decree their divorce. (3) The divorce must not have been obtained by collusion or by a fraudulent evasion of British law. If these conditions are not complied with, the divorce will not be recognised in England. The first condition was expressly laid down in *Lolley's case* (*a*). Lolley was married in England. He afterwards took his wife to Scotland in order to institute a suit for divorce there, and with a view to this suit Lolley committed adultery in Scotland. He was throughout a domiciled Englishman. The Scotch court decreed a divorce, and Lolley then married again in England, and was indicted for bigamy. He pleaded his Scotch divorce, but this was held to be of no effect in England. The twelve judges were "unanimously of opinion that no sentence or act of any foreign country or State could dissolve an English marriage *à vinculo*, for ground on which it was not liable to be dissolved *à vinculo* in England." Lolley was accordingly convicted and sent to the hulks (*b*). It seems to be now a settled rule of English law, that a divorce decreed abroad of persons who married in England, and were domiciled British subjects at the time of their marriage, will not be recognised in England, if at the time of their divorce the parties were not domiciled in the country decreeing the divorce (*c*). The same rule appears to hold good in the United States (*d*). Whether, if so domiciled, the English courts would recognise and act upon such a divorce appears to be a question not wholly free from doubt; but the better opinion seems to be that they would do so if the divorce be for a ground of divorce recognised as such in this country, and the foreign country be not resorted to for the collusive purpose of calling in the aid of its tribunals (*e*).

§ 151b. Divorce

The only fair and satisfactory rule to adopt as regards jurisdiction is

(*y*) *Dorsey* v. *Dorsey*, Chandler's Law Reporter, vol. i. p. 287.

(*z*) Kent's Comm. vol. ii. p. 107, 5th edit.

(*a*) [Russ. & Ry. 237].

(*b*) [2 Cl. & F. 569].

(*c*) [*Conway* v. *Beazley*, 3 Hagg. Ecc. 639; *Dolphin* v. *Robins*, 7 H. of L. Cas. 391; *Pitt* v. *Pitt*, 4 Macqueen, Scotch Ap. 627].

(*d*) [*Kerr* v. *Kerr*, 41 New York, 272; *Phelps* v. *Baker*, 60 Barbour, 107. Field, Int. Code (2nd edit.), ch. I. p. 448. Bishop on Marriage (5th edit.), vol. ii. § 141].

(*e*) [*Shaw* v. *Att.-General*, L. R. 2 P. & D. 161. See *Maguire* v. *Maguire* 7 Dana (Kentucky), 185].

to insist upon the parties in all cases referring their matrimonial differences to the courts of the country in which they are domiciled. Different communities have different views and laws respecting matrimonial obligations, and a different estimate of the causes that should justify divorce. It is both just and reasonable, therefore, that the differences of married people should be adjusted in accordance with the laws of the community to which they belong, and dealt with by the tribunals which alone can administer those laws. An adherence to this principle will preclude the scandal which arises when a man and woman are held to be man and wife in one country, and strangers in another (*f*). Though there can be no doubt of the soundness of this principle, it cannot, unfortunately, be considered as absolutely established in English law, though there has been a tendency to adopt it in recent cases (*g*). Nor would it, even if firmly established, in every case prevent collision between the courts of different countries, because there would still, in each case, remain the fact of domicile to be established; and as all countries do not adopt the same rules of evidence, the evidence on this question might be very different in one country to what it would be in another (*h*).

should be decided in the country of domicile.

§ 151c. Domicile necessary to give jurisdiction to divorce.

Another difficulty surrounding the question of domicile for purposes of divorce arises from its being doubtful whether a domicile *for all purposes* is necessary to give a foreign Court such jurisdiction as will ensure the recognition of the divorce in England. Lord Colonsay said in a case before the House of Lords in 1868, "It was said that a foreign Court has no jurisdiction in the matter of divorce, unless the parties are domiciled in the country; but what is meant by 'domicile?' I observe that it is designated sometimes as a *bonâ fide* domicile, sometimes as a real domicile, sometimes as a *complete* domicile, sometimes as a domicile *for all purposes*. But I must, with deference, hesitate to hold that on general principles of jurisprudence, or rules of international law, the jurisdiction to redress matrimonial wrongs, including the granting of a decree of divorce *à vinculo*, depends on there being a *domicile* such as seems to be implied in some of these expressions. Jurisdiction to redress wrongs in regard to domestic relations does not necessarily depend on domicile for all purposes." His lordship observed that if the divorce was obtained *in fraudem legis*, it would not be given effect to in England. "But if you put the case of parties resorting to Scotland with no such view, and being resident there for a considerable time, though not so as to change the domicile for all purposes, and then suppose that the wife commits adultery in Scotland, and that the husband discovers it, and immediately raises an action of divorce in the Court in Scotland, where the witnesses reside, and where his own duties detain him, and that he proves his case and obtains a decree, which decree is unquestionably good in Scotland, and would, I believe, be recognized in most other countries, I am slow to think that it would be ignored England, be-

(*f*) [*Wilson* v. *Wilson*, L. R. 2 P. & M. 442].
(*g*) [*Niboyet* v. *Niboyet*, 3 P. D. 59, but see S. C. 4 P. D. 1].
(*h*) [*Wilson* v. *Wilson*, ubi sup.].

cause it had not been pronounced by the Court of Divorce here" (*i*). The other law lords do not appear to have shared in this opinion. It was, however, not necessary to decide the point, because in the case before the Court the domicile of the parties was English; the husband had committed adultery in England, and both parties had then gone to Scotland, and remained forty days there, simply to give the Scotch Court jurisdiction. The divorce was therefore an evasion of English law. "The result is," said Lord Westbury, "that a sentence of divorce under such circumstances may be binding in Scotland, although of no validity in the territory of England. . . . . But this disgraceful anomaly can only be removed by the Legislature" (*k*).

§ 151d. Case of the Princess Bibesco.

An interesting case regarding the effect to be attributed to the second marriage of a woman in Germany, who had been previously married in France, where divorce is not permitted, occurred in 1875. The Princesse de Bauffremont was married in France to a Frenchman, and in August, 1874, obtained a *séparation de corps* from the French Courts. In May, 1875, she was naturalized at Saxe-Altenbourg, and became a subject of the German Empire. She then domiciled herself near Dresden, and in October, 1875, married the Prince Bibesco, at Berlin, according to the laws of Germany. The opinion of Herr Holtzendorff, a professor at Munich, was asked as to the effect of this second marriage, and he fully considers the subject in his reply (*l*). By the law of Germany, naturalization will not be conferred unless the applicant is capable of contracting by the law of his own country (*m*). This refers to a general incapacity to contract, and the incapacity of a French subject to marry after a *séparation de corps*, is a special incapacity, and one not contemplated in the German law. Hence the naturalization of the Princess was valid in Germany. The French code (*n*) provides without any limitation, that the quality of French subject is lost by naturalization abroad, and by the common law of Germany a *séparation de corps* is looked upon as equivalent to a divorce (*o*). Thus Herr Holtzendorff argued that the Princess, having rightfully ceased to be a French, and having become a German subject, also acquired the right of marrying again, and that the marriage was certainly valid in Germany. Whether the marriage would be recognised in France appears to be an open question, but there is some authority for supposing that it would (*p*).

(*i*) [*Shaw* v. *Gould*, L. R. 3 H. L. 96. See also *Brodie* v. *Brodie*, 2 Sw. & Tr. 259].
(*k*) [Ibid., p. 88].
(*l*) [See Revue de Droit International, 1876, p. 205].
(*m*) [Law of 1st June, 1870].
(*n*) [Code Civil, art. 17].
(*o*) [Schulte, Handbuch des Katholischchen Eherechts (ed. 1855), p. 596].
(*p*) [Merlin, Questions de Droit, Divorce, § 11, p. 350. Story, § 214].

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CHAPTER IIA.

NATIONAL CHARACTER AND DOMICILE.

§ 151A. Distinctions between national character, domicile, and allegiance.

QUESTIONS relating to national character and domicile, are of such importance in private international law, and have so frequently arisen since Mr. Wheaton published the last additions to his text, that some account of the present state of the law on these points seems necessary. The question of domicile as it affects the property of merchants during war is considered in a subsequent part of this work (*a*). It has been distinguished from domicile *jure gentium* during peace (*b*).

It is necessary at the outset to distinguish clearly what is meant by the terms national character and domicile. The distinction was explained by Lord Westbury in the House of Lords as follows:—"The law of England, and of almost all civilized countries, ascribes to each individual at his birth two distinct legal states or conditions; one, by virtue of which he becomes the subject of some particular country, binding him by the tie of natural allegiance, and which may be called his political *status*; another, by virtue of which he has ascribed to him the character of a citizen of some particular country, and as such is possessed of certain municipal rights, and subject to certain obligations, which latter character is the civil *status* or condition of the individual, and may be quite different from his political *status*. The political *status* may depend on different laws in different countries; whereas the civil *status* is governed universally by one single principle, namely, that of domicile, which is the criterion established by law for the purpose of determining civil *status*. For it is on this basis that the personal rights of the party, that is to say, the law which determines his majority or minority, his marriage succession, testacy or intestacy must depend" (*c*). The political *status* of the individual is called his national character, his civil *status* is referred to by the term domicile. Domicile and residence are two distinct things. Residence is a matter of fact, although it is difficult to define what amounts to it (*d*), but domicile is an idea of law. It is a relation which the law creates between an individual and a particular country in which the individual is said to have his domicile (*e*). National character is also an idea of law, but it is quite distinct from domicile.

(*a*) [See *post*, §§ 318 to 339].
(*b*) [Per Dr. Lushington in *Hodgson* v. *De Beauchesne*, 12 Moo. P. C. 313].
(*c*) [*Udny* v. *Udny*, L. R. 1 Sc. & Div. 457].
(*d*) [*King* v. *Foxwell*, 3 Ch. D. 520].
(*e*) [*Bell* v. *Kennedy*, L. R. 1 Sc. & Div. 307].

A person may be invested with the national character, of one country, and be domiciled in another (*f*). Allegiance is a term synonymous with national character. By it is understood the obligations of fidelity and obedience, which an individual owes to the State whose national character he bears (*g*).

§ 151B. Definitions of domicile.

It is remarkable no definition of domicile has as yet been universally accepted (*h*). It has been said to be "A residence at a particular place accompanied with positive or presumptive proof of an intention to remain there for an unlimited time"(*i*). This explains what constitutes a domicile, perhaps better than it can otherwise be expressed, but t is not strictly a definition. The actual fact of residence makes it probable the party is domiciled there, but on the other hand a person may be domiciled in a country he seldom visits. In its ordinary acceptation a person's domicile means the country where he lives and has his home (*k*), and if he has been married and has not been separated from his wife, the country of his domicile will probably be the one where his wife lives—that is where his chief establishment for the purposes of habitation is. But the presumption thus created may be repelled by evidence that it was not the person's intention to remain there for an indefinite time (*l*). Two ingredients are essential to domicile. There must be the fact that an abode which can in some shape or other be considered a home exists in the country, and there must be the intention that this abode shall not cease to be the home within any definite period. The domicile of a wife is that of her husband (*m*), but if the husband and wife live apart, without being judicially separated, it seems that the wife may acquire a separate domicile from that of the husband (*n*).

§ 151C. Domicile of origin and of choice.

It is a settled principle that no man shall be without a domicile, and to secure this result the law attributes to every individual as soon as he is born the domicile of his father, if the child be legitimate, and the domicile of the mother if illegitimate. This has been called the domicile of origin, and is involuntary. Other domiciles, including domicile by operation of law, as on marriage, are domiciles of choice. For as soon as an individual is *sui juris*, it is competent to him to elect and assume another domicile, the continuance of which depends upon his act and will. When another domicile is put on, the domicile of origin is for that purpose relinquished, and remains in abeyance during the continuance of the domicile of choice; but as the domicile of origin is the creature of law, and independent of the will of the party, it would be inconsistent with the principles on which it is by law created and ascribed, to suppose that it is capable of being by the act of the party

(*f*) [Per Lord Chancellor Hatherley in *Udny* v. *Udny*, L. R. 1 Sc. & Div. 452. Field, Int. Code (2nd ed.), p. 128].

(*g*) [Field, Int. Code, 261].

(*h*) [*Maltass* v. *Maltass*, 1 Robertson, 74].

(*i*) [*Guyer* v. *Daniel*, 1 Binney, 349, note; *Mitchell* v. *U. S.* 21 Wallace, 352].

(*k*) [Story, Conflict of Laws, § 41].

(*l*) [*Forbes* v. *Forbes*, Kay, 364; *Aitchison* v. *Dixon*, L. R. 10 Eq. 589].

(*m*) [Story, § 46; *Firebrace* v. *Firebrace*, 17 L. J. P. D. & M. 41].

(*n*) [*Le Sueur* v. *Le Sueur*, 1 P. D. 139].

entirely obliterated and extinguished. It revives and exists whenever there is no other domicile, and it does not require to be regained or reconstituted *animo et facto*, in the manner which is necessary for the acquisition of a domicile of choice.

§ 151 D. Domicile of choice.

Domicile of choice is a conclusion or inference which the law derives from the fact of a man fixing voluntarily his sole or chief residence in a particular place, with an intention of continuing to reside there for an unlimited time. This is a description of the circumstances which create or constitute a domicile, not a definition of the term. There must be a residence freely chosen and not prescribed or dictated by any external necessity, such as the duties of office, the demands of creditors, or the relief from illness; and it must be residence fixed, not for a limited period or particular purpose, but general and indefinite in its future contemplation. It is true that residence originally temporary, or intended for a limited period, may afterwards become general and unlimited, and in such a case, so soon as the change of purpose, or *animus manendi* can be inferred, the fact of domicile is established.

The domicile of origin may be extinguished by act of law, as, for example, by sentence of death or exile for life, which puts an end to the *statis civilis* of the criminal; but it cannot be destroyed by the will or act of the party.

Domicile of choice, as it is gained *animo et facto*, so it may be put an end to in the same manner. When put an end to, the domicile of origin revives and continues until the individual acquires another domicile of choice. Suppose a natural born Englishman to settle in Holland and acquire a Dutch domicile. After a time he quits Holland and travels in France or Italy without settling anywhere. As soon as he quits Holland, his English domicile of origin revives, and continues till he acquires another domicile of choice (*o*).

§ 151 E. Change of domicile.

What is a man's domicile is a question of fact; the consequences of being invested with it, when ascertained, are a question of law. The intention of a person to acquire a domicile of choice must be collected from various *indicia* incapable of precise definition (*p*). When a domicile has been acquired it is presumed to continue until it is shown to be renounced, and when a change is alleged, the burden of proof rests upon the party making the allegation (*q*). Mere length of residence in a foreign country will not of itself confer a new domicile, but it raises a presumption that it was the intention of the party to acquire such domicile (*r*). This presumption may be rebutted by evidence showing that there was not such an intention. It may also be presumed that a person is less likely to relinquish a domicile of origin than a domicile of choice; greater proof of intention is required in the former than in the latter case (*s*). This is so especially when the party is connected

(*o*) [See judgment of Lord Westbury in *Udny* v. *Udny*, L. R. 1 Sc. & Div. 457–9].

(*p*) [*Forbes* v. *Forbes*, Kay, 353].

(*q*) [*Desmare* v. *U. S.*, 3 Otto, 605; *Crockenden* v. *Fuller*, 1 Sw. & Tr. 442; *Mitchell* v. *U. S.*, 21 Wallace, 350].

(*r*) [*Brunel* v. *Brunel*, L. R. 12 Eq. 300].

(*s*) [*Bell* v. *Kennedy*, L. R. 1 Sc. & Div. 307; *Shaw* v. *Shaw*, 98 Massa-

with the country of his domicile of origin by some specific ties, such as being a peer of the realm, or serving in some public capacity such as the army or civil service (*t*).

To change his domicile of origin a person must choose a new domicile —the word "choose" indicates that the act is voluntary on his part— he must choose a new domicile by fixing his sole or principal residence in a new country with the intention of residing there for a period not limited as to time (*u*). To change a domicile of choice it need only be relinquished, without any new domicile of choice being necessarily chosen.

§ 151 F. Intention to change domicile.

The intention required for a change of domicile as distinguished from the action embodying it, is not necessarily an intention to change a civil *status;* that is, an intention to cease to be subject to the laws of one country, and to place oneself under the laws of another. It is sufficient to work the change, if there be an intention to settle in a new country as a permanent home. If this intention exists, and is sufficiently carried into effect by acts, certain legal consequences follow, whether such consequences were intended or not, and perhaps even though the person in question may have intended the exact contrary. To prove such intention (in the absence of any express declaration), the evidence must lead to the inference that if the question had been formally submitted to the person whose domicile was in question, he would have expressed his wish in favour of a change (*x*).

According to the French code the domicile of every Frenchman "*est le lieu où il a son principal établissement*" (*y*).

§ 151 G. Acquisition of domicile and national character.

Domicile depends almost entirely upon the will of the individual. He is invested with a domicile of origin at his birth, and this is involuntary, but he may by his own act change this and cause it to be inoperative while the new domicile subsists, by locating himself in any country he pleases with the intention of settling there. National character, on the other hand, depends upon the will of the State. To divest himself of the national character he acquired at the time of his birth, an individual must in many cases obtain the consent of his own government, and to acquire a new national character the consent of the country of his adoption is always necessary (*z*).

§ 151 H. Incidents of national character.

National character confers benefits, and imposes duties on the individual. It entitles him to the protection of his country wherever he may be, but it requires him to fulfil the duties of supporting the State, or defending it against its enemies. The extent to which States will protect their subjects, or claim their allegiance when abroad, depends

chusetts, 158; *Whicker* v. *Hume*, 7 H. of L. Cas. 124. Wharton, Conflict of Laws, § 55].

(*t*) [*Hamilton* v. *Dallas*, 1 Ch. D. 257; *Hodgson* v. *De Beauchesne*, 12 Moo. P. C. 285; *Sharpe* v. *Crispin*, L. R. 1 P. & M. 611; *Niboyet* v. *Niboyet*, 3 P. D. 52].

(*u*) [*King* v. *Foxwell*, 3 Ch. D. 520].

(*x*) [*Douglas* v. *Douglas*, L. R. 12 Eq. 644—5; *Haldane* v. *Eckford*, L. R. 8 Eq. 631].

(*y*) [Code Civil, art. 102].

(*z*) [Westlake, § 20. *Inglis* v. *Sailor's Snug Harbour*, 3 Peters, 125. Halleck, p. 695].

entirely upon the discretion and municipal laws of each. A government can always refuse to protect one of its subjects, if it considers that his conduct has shown an intention of renouncing all ties and fulfilling no duties towards his country. It may, also, in case he comes within its jurisdiction, force him to fulfil any obligations incurred before he quitted it. If he has acquired another national character, without his native State renouncing its authority over him, the claims of each State to him can only be determined by treaty, if any exist, or by diplomatic action between the respective governments (*a*).

§ 151 I. Permanent residents in foreign countries.

The fact of establishing a permanent residence in a foreign country, without being naturalized in it, places a person in a different position towards his native country from that he occupies while only quitting it as a traveller. He does not thereby lose the right to its protection, but it renders the invocation of it less reasonable. He cannot claim to be exempt from taxes and other burdens not imposed on a simple stranger, and he has no ground of complaint if its municipal laws invest him with both the benefits and disabilities of a native (*b*). If the country is invaded, and his property is injured or destroyed by some act of war, he has no claim to any special protection from his native country so long as his position is no worse than that of the other inhabitants. Numerous applications were made to England to protect the property of British subjects resident in France, from the requisitions of the Franco-German war of 1870-71, but Lord Granville replied, that such British subjects must bear the same burdens as the other inhabitants (*c*).

§ 151 J. Expatriation by the law of England.

Down to the year 1870, England invariably denied the right of her subjects to expatriate themselves. She placed no restrictions whatever on emigration, but maintained that her subjects carried their national character with them wherever they went, and were always liable to be treated as subjects on their return (*d*). This claim has now been abandoned. It is expressly provided by Act of Parliament, that "Any British subject who has at any time before, or may at any time after the passing of this Act, when in any foreign State and not under any disability, voluntarily become naturalized in such State, shall from and after the time of his so having become naturalized in that foreign State, be deemed to have ceased to be a British subject and be regarded as an alien." It is also provided that if naturalized abroad before the passing of the act, he yet wishes to remain a British subject, he shall make a declaration to that effect, and take the oath of allegiance, and he will then be deemed to have been continually a British subject, except in the State where he was naturalized, as long as he remains a subject of it (*e*). Natural born British subjects includes not only persons born in British dominions,

Who are natural born

(*a*) [This subject is fully considered in the Report of the Naturalization Commission, 1869, and Sir A. Cockburn on Nationality. The Report is, to a great extent, reprinted in the U. S. Diplomatic Correspondence, 1873. Appendix].

(*b*) [Phillimore, vol. ii. p. 6].

(*c*) [Annual Register, 1871. Pub. Docts., p. 259].

(*d*) [As to the impressment of seamen, see *ante*, § 108].

(*e*) [The Naturalization Act, 1870, 33 & 34 Vict. c. 14, s. 6. See Appendix A.].

British subjects.

but also the children and grand-children of British subjects, born out of the ligeance of Her Majesty, unless the father was at the time of the child's birth outlawed or attainted for treason (*f*). Such persons are, therefore, entitled to claim British protection unless they have been naturalized in some other country. But if they were born abroad and have thereby become the subjects of some other State, it seems that England will not protect them against that State (*g*).

§ 151 K. Law of the United States as to expatriation.

The question of expatriation is one of vital importance in the United States. It was estimated in 1868 that upwards of six million persons had emigrated to that country since 1790, and that they and their descendants numbered more than twenty millions (*h*). The position of the government is, therefore, most anomalous if that number of its subjects owe allegiance to foreign States, and it is remarkable that under such circumstances the law should have so long continued doubtful. The Executive government have always claimed an unlimited right of expatriation for the subjects of all other countries, but when, within the last few years, the question presented itself in the Supreme Court, not one of the judges affirmed, while several denied the right for its own citizens (*i*). To remedy this an Act of Congress has been passed which provides that "Any declaration, instruction, order, or decision of any officer of the United States, which denies, restricts, impairs, or questions the right of expatriation is declared inconsistent with the fundamental principles of the Republic" (*k*). This act is, however, only declaratory, and no provision is made in it respecting what is to be considered an act of expatriation. It furnishes no rule for the Executive to determine whether a person is still an American citizen or not, although it subsequently declares that "All naturalized citizens of the United States, while in foreign countries, are entitled to, and shall receive from, the government the same protection of persons and property which is accorded to native born citizens" (*l*).

§ 151 L. Who are citizens of the United States.

Two laws exist for determining who is a citizen. The Act of Congress of the 10th of February, 1855, provides that "persons heretofore born, and hereafter to be born, out of the limits and jurisdiction of the United States, whose fathers were, or shall be at the time of their birth, citizens of the United States, shall be deemed and considered, and are hereby declared to be citizens of the United States: Provided, however, that the rights of citizenship shall not descend to persons whose fathers never resided in the United States" (*m*). The Fourteenth Amendment to the Constitution declares "All persons born or naturalized in the United

(*f*) [7 Anne, c. 5, s. 3; 4 Geo. II., c. 21, s. 1; 13 Geo. III. c. 21, s. 1. See Boyd, The Merchant Shipping Laws, p. 15].

(*g*) [Lord Russell to Sir J. Crampton, 9th July, 1862. Nat. Comm. Rep. p. 74].

(*h*) [Report of U. S. Committee on Foreign Affairs, 1868].

(*i*) [Opinions of Attorneys-General, vol. viii. p. 139. Kent, Comm., vol. ii. p. 49. *Inglis* v. *Sailor's Snug Harbour*, 3 Peters, 125. Halleck, p. 695].

(*k*) [Act of July, 1868, c. 249, s. 1. U. S. Revised Statutes, tit. xxv. Citizenship, sec. 1999].

(*l*) [Ibid., s. 2; sec. 2000].

(*m*) [U. S. Statutes at Large, vol. x. p. 604].

States, and subject to the jurisdiction thereof, are citizens of the United States" (*n*).

§ 151 M United States' citizens abroad.

The law thus states distinctly who are citizens, but the right of expatriation being admitted, it becomes a matter of difficulty to determine when individuals cease to be citizens, or at all events when they cease to be entitled to the protection of the United States.

"The American citizen," said Chief Justice Marshall, "who goes into a foreign country, although he owes local and temporary allegiance to that country, yet, if he performs no other act changing his position, is entitled to the protection of our Government; and if without the violation of any municipal law, he should be oppressed unjustly, he would have a right to claim that protection, and the interposition of the American Government in his favour would be considered a justifiable interposition. But his situation is completely changed, where, by his own act, he has made himself the subject of a foreign power. Although this act may not be sufficient to rescue him from punishment for any crime committed against the United States, a point not intended to be decided, yet it certainly places him out of the protection of the United States while within the territory of the sovereign to whom he has sworn allegiance" (*o*).

In 1873, Mr. Fish issued instructions to the American Minister in France, in which, after quoting the above dictum of Chief Justice Marshall, he thus explains the principles upon which the American Government now acts in protecting its subjects abroad. "If on the one hand the Government assumes the duty of protecting his rights and privileges, on the other hand the citizen is supposed to be ever ready to place his fortune and even his life at its service, should the public necessities demand such a sacrifice. If, instead of doing this, he permanently withdraws his person from the national jurisdiction; if he places his property where it cannot be made to contribute to the national necessities; if his children are born and reared upon a foreign soil, with no purpose of returning to submit to the jurisdiction of the United States, then, in accordance with the principles laid down by Chief Justice Marshall, and recognised in the 14th Amendment, and in the Act of 1868, he has so far expatriated himself as to relieve this Government from the obligation of interference for his protection.

"Each case as it arises must be decided on its own merits. In each the main fact to be determined will be this,—has there been such a practical expatriation as removes the individual from the jurisdiction of the United States?

"If there has not been the applicant will be entitled to protection" (*p*).

What amounts to expatria-

Although the American Government may refuse to protect any individual citizen who is abroad without an apparent intention of returning, it does not follow that such a person is necessarily expatriated. If he

(*n*) [Ratified, 20th June, 1868. U. S. Statutes at Large, vol. xv. p. 706].
(*o*) [*Murray* v. *The Charming Betsy*, 2 Cranch, 119].
(*p*) [Mr. Fish to Mr. Washburne, 28th June, 1873. U. S. Dipl. Cor. 1873, p. 259. See also Ib. 1875, p. 489 and p. 563].

tion of an American citizen.

is naturalized abroad, this will amount to an act of expatriation, and the same effect may be attributed to the acceptance of public or military employment in a foreign State without naturalization. Naturalization is without doubt the highest, but not the only evidence of expatriation (*q*). But the mere fact of residence abroad without an intention of returning does not of itself amount to an act of expatriation (*r*).

American certificates of naturalization.

Certificates of naturalization are issued in America when the requirements for becoming a citizen have been complied with. There is, however, no uniform system of registration of such certificates, and as there are about 3,000 Federal and State courts having power to grant them, great difficulties sometimes arise in proving naturalization. But when a certificate, valid on the face of it, and founded on the decree of a competent court, is produced, it cannot be questioned except through judicial proceedings instituted for the purpose (*s*).

§ 151 N. Naturalization Treaty between England and America.

Such is the present state of the law in England and America (*t*). The probability of future disputes between the two countries on the subject of allegiance has been reduced to a minimum, by a convention concluded between them on the 13th May, 1870, by which it is agreed that citizens of either country naturalized as citizens or subjects of the other, are to be treated in all respects as citizens or subjects of such country. This naturalization may, however, be renounced, and the former nationality of the individual resumed on compliance with certain formalities (*u*). Treaties more or less similar exist between the United States and most other civilized countries (*x*).

§ 151 O. Former discussion between England and America as to the allegiance of their subjects.

The claims of both England and America, before the laws of each assumed their present shape, either to protect their subjects or to require their services when abroad, have caused endless discussions. In 1848 and 1866, Irish agitators resorted to the United States for the purpose of organizing plots against the British government. The Habeas Corpus Act was suspended on both occasions, and several persons were arrested in Ireland on suspicion of having been concerned in treasonable acts either in the United States, or in Ireland. Of the right of England to punish her subjects for treason, wherever committed, there could be no doubt; nor could the right to punish native born Americans for acts against the government committed in the British Isles be disputed (*y*). The cases which presented any difficulty were those of native born British subjects who had been naturalized in America, and had only conspired there without committing overt acts in Great Britain. At that

(*q*) [Opinions of Att.-Gen. (U. S.), vol. xiv. p. 296].

(*r*) [Ibid., vol. ix. p. 359].

(*s*) [See case of the Kastellans. U. S. Dipl. Cor. 1875, p. 577].

(*t*) [In 1873 the President addressed a series of questions on this subject to the heads of the various American state departments. The past and present American law is fully discussed in the answers. See U. S. Dipl. Cor. 1873, p. 1150, *et seq.*].

(*u*) [See Appendix A. The Naturalization Act, 1872, Schedule. Also U. S. Statutes at Large, vol. xvi. p. 775].

(*x*) [See Analysis of U. S. Naturalization Treaties. U. S. Dipl. Cor. 1873, p. 1274].

(*y*) [Mr. Seward to Mr. Adams, 10th March, 1867. U. S. Dipl. Cor. 1867 p. 74].

time the doctrine of perpetual allegiance was strongly insisted on in England. The maxim *nemo potest exuere patriam* was considered a fundamental one in English law. The United States maintained that their naturalized citizens were to all intents and purposes as much entitled to protection abroad as native born Americans (*z*), and that such persons could therefore not be arbitrarily imprisoned under a suspension of the Habeas Corpus Act, but were entitled to a trial. To this Lord Palmerston replied, that native born British subjects who were naturalized abroad and returned to the United Kingdom were as amenable to British law as any other subjects of Her Majesty (*a*). In the cases of Warren and Costello, tried in Ireland in 1867, the Judges refused a jury *de medietate linguae*, on the ground that, although the prisoners had been naturalized in America, they had been native born British subjects, and, being once under the allegiance of the British sovereign, they remained so for ever (*b*). Most of the persons arrested who could prove their naturalization in America were, however, liberated at the request of the American government, unless treasonable acts were proved to have been committed by them in Ireland (*c*).

§ 151 P. British subjects in America during the Civil War.

During the American civil war the protection of England was frequently demanded against conscription in the United States army. Lord Lyons was instructed that there is no rule or principle of international law which prohibits the government of any country from requiring aliens resident within its territories to serve in the militia or police of the country, or to contribute to the support of such establishments (*d*). But Her Majesty's government would not consent to British subjects being compelled to serve in the armies of either party, where, besides the ordinary incidents of battle, they would be exposed to be treated as traitors or rebels in a quarrel in which, as aliens, they had no concern, and on their return to England would incur the penalties imposed on British subjects for having taken part in the war (*e*). All who could prove their British nationality were accordingly exempted from military service (*f*). But if a British subject had become naturalized in America, England refused to protect him so long as he remained there (*g*). Individuals who had declared their intention of becoming naturalized, but had not completed the necessary formalities, were also treated as aliens, and exempted (*h*); but Her Majesty's government declined to interfere in their behalf if they had voted at elections, or in any other way exercised any of the exclusive privileges of a citizen (*i*). In 1863 an Act of Congress was passed, specially including "intended" citizens in a further

(*z*) [Mr. Buchanan to Mr. Bancroft, 28th Oct. 1848. Hertslet's State Papers, vol. xlvii. p. 1236].
(*a*) [16th August, 1849].
(*b*) [Report of Naturalization Commission, 1868, p. 49 and p. 90].
(*c*) [Ibid., p. 48, *et seq.*].
(*d*) [To Lord Lyons, No. 76, April 4th, 1861].
(*e*) [To Lord Lyons, No. 349, 7th Oct. 1861. Parl. Papers, N. America (No. 13), 1864, p. 34].
(*f*) [Lord Lyons, No. 379, 29th July, 1861].
(*g*) [To Lord Lyons, No. 259, 7th June, 1862].
(*h*) [Mr. Seward to Mr. Stuart, Aug. 20th, 1862].
(*i*) [Consular Circular from Mr. Stuart, No. 99, 25th July, 1862].

enrolment of the militia (*k*); and a proclamation of the President allowed sixty-five days to such persons to leave the country, or become liable to be enrolled by remaining. To this Great Britain acquiesced, the period allowed for departure being deemed sufficient (*l*). It was regarded as an established principle that a government might, by an *ex post facto* law, include in its conscription any persons permanently resident in its territory, provided it allowed them reasonable time and facilities for departure on the promulgation of such a law (*m*).

§ 151 Q. Prussian laws.

The Prussian military laws, which have now been introduced throughout the German Empire (*n*), declare that every German subject is liable to military service, and cannot have that service performed by deputy (*o*). The right to emigrate is, however, not restricted, except as regards the performance of military service (*p*). Permission to emigrate may be obtained, but this permission, when granted, destroys the quality of Prussian or German subject (*q*). It is not to be granted to males between the ages of seventeen and twenty-five, without a certificate from the military commission of their district, or to actual soldiers or officers before their discharge, or to persons convoked for military service (*r*). If anyone does emigrate without permission, and to avoid performing his military service, he becomes liable to a fine or imprisonment, nor does the infliction of the penalty relieve him from performing the military duties (*s*).

Numerous cases have occurred of Prussians evading these duties by going abroad, and then returning to Prussia and claiming to be under the protection of some foreign State. Johann Knocke, a native born Prussian, was naturalized in America, and on returning to Prussia claimed exemption from military service. Mr. Wheaton, then American Minister at Berlin, told him that as long as he was in any other country but Prussia he would be protected, "but having returned to the country of your birth, your native domicile and national character revert (so long as you remain in Prussian dominions), and you are bound to obey the laws as if you had never emigrated" (*t*). This rule was observed in similar cases until 1859, when the United States endeavoured to protect Hofer from the conscription. Mr. Cass asserted that "the moment a foreigner becomes naturalized, his allegiance to his native country is severed for ever" (*u*). This pretension, however, was not persisted in, nor did it meet with the approval of all American jurists (*x*). During the civil

(*k*) [U. S. Statutes at Large, vol. xii. p. 731].
(*l*) [To Lord Lyons, No. 485, 31st Aug. 1863].
(*m*) [Parl. Papers, 1863, N. America (No. 13), p. 34. To Lord Lyons, No. 293, 27th Nov. 1862].
(*n*) [Constitution of the Empire, art. 61. Hertslet, Map of Europe, vol. iii. p. 1947].
(*o*) [Art. 57].
(*p*) [Prussian Constitution, 1850, tit i. art. i.].
(*q*) [Law of 31st Dec. 1842, § 15].
(*r*) [Ibid, § 17].
(*s*) [Penal Code, April 14th, 1851].
(*t*) [U. S. Senate Documents, 1859—60, vol. ii. p. 6. See other cases, ibid. pp. 9—57, p. 1364; and Nat. Comm. Rep. p. 53].
(*u*) [Ibid., p. 133].
(*x*) [Halleck, p. 700].

war, it being found that many persons quitted the United States to escape the conscription there, and then applied to that government to save them from serving in the Prussian army, Mr. Judd, American Minister in Prussia, was instructed not to interfere on behalf of such "worthless citizens" (*y*). On the 22nd February, 1868, a treaty was signed between the United States and the North German Confederation, containing terms similar to that between the United States and England, except that residence for five years in the country adopted is required in order to entitle the individual to its protection (*z*).

British subjects in Prussia.

England has acted upon similar principles respecting Prussians who have claimed exemption on the ground of being British subjects. In 1862, Mr. Crossthwaite, Her Majesty's Consul at Cologne, who had naturalized himself in Prussia, was informed by Her Majesty's Government that his sons were liable to military service while they remained in Prussia (*a*).

Conditions of naturalization in Germany.

A foreigner is not permitted to naturalize himself in Germany unless (1) by the law of his own country he is capable of contracting, or if incapable, has obtained the consent of his parent or guardian, (2) unless his conduct has been irreproachable, (3) unless he will be received and find an abode at the place where he proposes to settle, (4) and unless he will be able to live so as to support himself and family (*b*).

§ 151 B. Cases of Martin Kozta and Simon Tousig.

The cases of Martin Kozta and Simon Tousig were instances of Austrian subjects leaving their country, and claiming the protection of the United States, after having only declared their intention of being naturalized in America. Kozta was a Hungarian refugee of 1848-9. He went to Turkey and was imprisoned there, but released on condition of leaving the country. He then went to America and declared his intention of being naturalized. In 1853 he went to Smyrna, and obtained from the United States Consul a travelling pass, stating he was entitled to American protection. While there, he was seized by some persons in the pay of Austria, who took him out in a boat and threw him into the sea, whence he was picked up by the *Hussar*, an Austrian ship of war. The American Consul demanded his release, but this being refused, an American ship of war, the *St. Louis*, was sent to take him by force if his detention was still insisted on. The matter was compromised by Kozta being shipped off to the United States, while Austria reserved the right to proceed against him if he returned to Turkey. Mr. Marcy, in his despatch to the Austrian Government, justly affirmed that whether Kozta was entitled to American protection or not, Austria had no right to seize him upon Turkish soil, and in spite of the protests of the Turkish Government (*c*). Simon Tousig on returning to Austria was arrested for offences committed before he had

Simon Tousig.

(*y*) [U. S. Dipl. Cor. 1863, Pt. II. p. 1020].

(*z*) [U. S. Statutes at Large, vol. xv. p. 615; and see Nat. Comm. Rep. p. 149. For the English treaty see Appendix A, 35 & 36 Vict. c. 39, schedule].

(*a*) [Nat. Comm. Rep. p. 73].

(*b*) [Imperial Law, 1st June, 1870. See Revue de Droit Int. 1876, p. 206].

(*c*) [State Papers, vol. xliv. pp. 925—1042. Wheaton, by Dana, p. 146. Westlake, § 54].

left that country. Mr. Marcy declined to interfere for him, on the ground that "having once been subject to the laws of Austria, and while under her jurisdiction violated those laws, his withdrawal from that jurisdiction and acquiring a different national character would not exempt him from their operation whenever he again chose to place himself under them" (*d*). Another case occurred in 1873. François A. Heinrich was born in New York of Austrian parents, who were not naturalized in the United States, and three or four years after his birth he was taken to Austria. On becoming of age he claimed to be exempt from serving in the Austrian army, but the United States declined to interfere on his behalf, he being taken to have expatriated himself (*e*).

Case of Heinrich.

§ 1518. Law of France.

The law of France requires every Frenchman to perform military service in person (*f*), and imposes a penalty on any one who emigrates without having served his time in the army. But the law also provides that no one but a Frenchman can be admitted into the French army (*g*), and the quality of Frenchman is *ipso facto* lost by naturalization abroad (*h*). Thus an *insoumis*, or person who fails to join his standard when called upon, ceases to be liable to the conscription on acquiring a foreign nationality, although he still remains subject to the penalty for evading the military law. If, however, he remains abroad for three years from the date of his naturalization, his offence is purged by prescription, and it appears that he may then return to France free from all liability (*i*).

Case of Lucien Alibert.

Lucien Alibert, a French subject, went to America in 1838 at the age of 18. In 1846 he was naturalized in the United States, and on returning to France in 1852 he was arrested as an *insoumis*. He pleaded his naturalization in America, and though at first convicted, the sentence was quashed by the superior military court of Toulon, on the ground that more than three years had elapsed from the time when he was naturalized to the date of his return to France (*k*).

Case of Ignacio Tolen.

In the case of Ignacio Tolen, a Spaniard, Mr. Webster said, that if the law of Spain had not permitted him to renounce his allegiance, he must expect it to deal with him as with a subject when he placed himself within its reach (*l*).

(*d*) [Wheaton, by Laurence, App. p. 929].
(*e*) [U. S. Dipl. Cor. 1873, p. 78].
(*f*) [Law of 27th July, 1872, tit. i. § 1].
(*g*) [Ibid, § 7].
(*h*) [Code Napoleon. Code Civil, liv. i. ch. ii. § 17].
(*i*) [Opinion of M. Treitt. Naturalization Commission Report, 1868, p. 21. Case of Michel Zeiter. Tribunal de Wissembourg, 1860. Nat. Comm. Rep. p. 87].
(*k*) [U. S. Senate Documents, 1859—60, vol. ii. p. 176].
(*l*) [Halleck, p. 698].

CHAPTER III.

RIGHTS OF EQUALITY.

§ 152. Natural equality of States modified by compact and usage.

THE natural equality of sovereign States may be modified by positive compact, or by consent implied from constant usage, so as to entitle one State to superiority over another in respect to certain external objects, such as rank, titles, and other ceremonial distinctions.

§ 153. Royal honours.

Thus the international law of Europe has attributed to certain States what are called *royal honours*, which are actually enjoyed by every empire or kingdom in Europe, by the Pope, the grand duchies in Germany, and the Germanic and Swiss confederations. They were also formerly conceded to the German empire, and to some of the great republics, such as the United Netherlands and Venice.

These *royal honours* entitle the States by whom they are possessed to precedence over all others who do not enjoy the same rank, with the exclusive right of sending to other States public ministers of the first rank, as ambassadors, together with certain other distinctive titles and ceremonies (*a*).

§ 154. Precedence among princes and states enjoying royal honours.

Among the princes who enjoy this rank, the Catholic powers concede the precedency to the Pope, or sovereign pontiff; but Russia and the Protestant States of Europe consider him as bishop of Rome only, and a sovereign prince in Italy, and such of them as enjoy royal honours refuse him the precedence.

The Emperor of Germany, under the former constitution of the empire, was entitled to precedence over all other temporal princes, as the supposed successor of Charlemagne and of the Cæsars in the empire of the West; but since the dissolution

(*a*) Vattel, Droit des Gens, tom. i. liv. ii. ch. 3, § 38. Martens, Précis du Droit des Gens Moderne de l'Europe, liv. iii. ch. 2, § 129. Klüber, Droit des Gens Moderne, pt. ii. tit. i. ch. 3, §§ 91, 92. Heffter, § 28.

of the late Germanic constitution, and the abdication of the titles and prerogatives of its head by the Emperor of Austria, the precedence of this sovereign over other princes of the same rank may be considered questionable (*b*).

The various contests between crowned heads for precedence are matter of curious historical research as illustrative of European manners at different periods; but the practical importance of these discussions has been greatly diminished by the progress of civilization, which no longer permits the serious interests of mankind to be sacrificed to such vain pretensions.

§ 155. The great Republics.

The text-writers commonly assigned to what were called the *great republics*, who were entitled to royal honours, a rank inferior to crowned heads of that class; and the United Netherlands, Venice, and Switzerland, certainly did formerly yield the precedence to emperors and reigning kings, though they contested it with the electors and other inferior princes entitled to royal honours. But disputes of this sort have commonly been determined by the relative power of the contending parties, rather than by any general rule derived from the form of government. Cromwell knew how to make the dignity and equality of the English Commonwealth respected by the crowned heads of Europe; and in the different treaties between the French Republic and other powers, it was expressly stipulated that the same ceremonial as to rank and etiquette should be observed between them and France which had subsisted before the revolution (*c*).

§ 156. Monarchs not crowned and semi-sovereigns.

Those monarchical sovereigns who are not crowned heads, but who enjoy royal honours, concede the precedence on all occasions to emperors and kings.

Monarchical sovereigns who do not enjoy royal honours yield the precedence to those princes who are entitled to these honours.

Semi-sovereign or dependent States rank below sovereign States (*d*).

(*b*) Martens, § 132. Klüber, § 95. [Especially since 1866, when Austria was excluded from taking part in the affairs of Germany.]

(*c*) Treaty of Campo Formio, art. 23, and of Luneville, art. 17, with Austria. Treaties of Basle with Prussia and Spain. Schoell, Histoire des Traités de Paix, tom. i. p. 610. Edit. Bruxelles.

(*d*) Klüber, § 98.

Semi-sovereign States, and those under the protection or *Suzeraineté* of another sovereign State, necessarily rank below that State on which they are dependent. But where third parties are concerned, their relative rank must be determined by other considerations; and they may even take precedence of States completely sovereign, as was the case with the electors under the former constitution of the Germanic empire, in respect to other princes not entitled to royal honours (*e*).

These different points respecting the relative rank of sovereigns and States have never been determined by any positive regulation or international compact: they rest on usage and general acquiescence. An abortive attempt was made at the Congress of Vienna to classify the different States of Europe, with a view to determine their relative rank. At the sitting of the 10th December, 1814, the plenipotentiaries of the eight powers who signed the treaty of peace at Paris, named a committee to which this subject was referred. At the sitting of the 9th February, 1815, the report of the committee, which proposed to establish three classes of powers, relatively to the rank of their respective ministers, was discussed by the Congress; but doubts having arisen respecting this classification, and especially as to the rank assigned to the great republics, the question was indefinitely postponed, and a regulation established determining merely the relative rank of the diplomatic agents of crowned heads (*f*).

§ 157. Usage of the *alternat*.

Where the rank between different States is equal or undetermined, different expedients have been resorted to for the purpose of avoiding a contest, and at the same time reserving the respective rights and pretensions of the parties. Among these is what is called the usage of the *alternat*, by which the rank and places of different powers are changed from time to time, either in a certain regular order, or one determined by lot. Thus, in drawing up public treaties and conventions, it is the usage of certain powers to *alternate*, both in the preamble and the signatures, so that each power occupies, in the copy intended to be delivered to it, the first place. The regulation of the Congress of Vienna, above referred to, provides that in acts and treaties between those powers which admit

(*e*) Heffter, das Europäische Völkerrecht, § 28, No. iii.
(*f*) Klüber, Acten des Weiner Congresses, tom. viii. pp. 98, 102, 108, 116.

the *alternat*, the order to be observed by the different ministers shall be determined by lot (*g*).

Another expedient which has frequently been adopted to avoid controversies respecting the order of signatures to treaties and other public acts, is that of signing in the order assigned by the *French* alphabet to the respective Powers represented by their ministers (*h*).

§ 158. Language used in diplomatic intercourse.

The primitive equality of nations authorises each nation to make use of its own language in treating with others, and this right is still, in a certain degree, preserved in the practice of some States. But general convenience early suggested the use of the Latin language in the diplomatic intercourse between the different nations of Europe. Towards the end of the fifteenth century, the preponderance of Spain contributed to the general diffusion of the Castilian tongue as the ordinary medium of political correspondence. This, again, has been superseded by the language of France, which, since the age of Louis XIV., has become the almost universal diplomatic idiom of the civilized world. Those States which still retain the use of their national language in treaties and diplomatic correspondence, usually annex to the papers transmitted by them a translation in the language of the opposite party, wherever it is understood that this comity will be reciprocated. Such is the usage of the Germanic Confederation, of Spain, and the Italian courts. Those States which have a common language generally use it in their transactions with each other. Such is the case between the Germanic Confederation and its different members, and between the respective members themselves; between the different States of Italy; and between Great Britain and the United States of America.

§ 159. Titles of sovereign rinces and States.

All sovereign princes or States may assume whatever titles of dignity they think fit, and may exact from their own subjects these marks of honour. But their recognition by other States is not a matter of strict right, especially in the case of new titles of higher dignity, assumed by sovereigns. Thus the royal title of King of Prussia, which was assumed by Frederick I. in 1701, was first acknowledged by the Emperor

(*g*) Annexe, xvii. à l'Acte du Congrés de Vienne, art. 7.
(*h*) Klüber, Uebersicht der diplomatischen Verhandlungen des Wiener Congresses, § 164.

of Germany, and subsequently by the other princes and States of Europe. It was not acknowledged by the Pope until the reign of Frederick William II. in 1786, and by the Teutonic knights until 1792, this once famous military order still retaining the shadow of its antiquated claims to the Duchy of Prussia until that period (*i*). So also the title of Emperor of all the Russias, which was taken by the Czar, Peter the Great, in 1701, was successively acknowledged by Prussia, the United Netherlands, and Sweden in 1723, by Denmark in 1732, by Turkey in 1739, by the emperor and the empire in 1745—6, by France in 1745, by Spain in 1750, and by the Republic of Poland in 1764. In the recognition of this title by France, a reservation of the right of precedence claimed by that crown was insisted on, and a stipulation entered into by Russia in the form of a *Réversale*, that this change of title should make no alteration in the ceremonies observed between the two courts. On the accession of the Empress Catherine II. in 1762, she refused to renew this stipulation in that form, but *declared* that the imperial title should make no change in the ceremonial observed between the two courts. This declaration was answered by the court of Versailles in a counter declaration, renewing the recognition of that title, upon the express condition, that, if any alteration should be made by the court of St. Petersburg in the rules previously observed by the two courts as to rank and precedence, the French crown would resume its ancient style, and cease to give the title of Imperial to that of Russia (*k*).

The title of Emperor, from the historical associations with which it is connected, was formerly considered the most eminent and honourable among all sovereign titles; but it was never regarded by other crowned heads as conferring, except in the single case of the Emperor of Germany, any prerogative or precedence over those princes.

§ 160. Maritime ceremonials.

The usage of nations has established certain maritime ceremonials to be observed, either on the ocean, or those parts of the sea over which a sort of supremacy is claimed by a particular State.

(*i*) Ward's History of the Law of Nations, vol. ii. pp. 245—248. Kluber, Droit des Gens Moderne de l'Europe, pt. ii. tit. i. ch. 2, § 107, note *c*.

(*k*) Flassan, Histoire de la Diplomatie Française, tom. vi. liv. iii. pp. 328—364.

Among these is the salute by striking the flag or the sails, or by firing a certain number of guns on approaching a fleet or a ship of war, or entering a fortified port or harbour.

Every sovereign State has the exclusive right, in virtue of its independence and equality, to regulate the maritime ceremonial to be observed by its own vessels towards each other, or towards those of another nation, on the high seas, or within its own territorial jurisdiction. It has a similar right to regulate the ceremonial to be observed within its own exclusive jurisdiction by the vessels of all nations, as well with respect to each other, as towards its own fortresses and ships of war, and the reciprocal honours to be rendered by the latter to foreign ships. These regulations are established either by its own municipal ordinances, or by reciprocal treaties with other maritime powers (*l*).

Where the dominion claimed by the State is contested by foreign nations, as in the case of Great Britain in the Narrow Seas, the maritime honours to be rendered by its flag are also the subject of contention. The disputes on this subject have not unfrequently formed the motives or pretexts for war between the powers asserting these pretensions, and those by whom they were resisted. The maritime honours required by Denmark, in consequence of the supremacy claimed by that power over the Sound and Belts, at the entrance of the Baltic Sea, have been regulated and modified by different treaties with other States, and especially by the convention of the 15th of January, 1829, between Russia and Denmark, suppressing most of the formalities required by former treaties. This convention is to continue in force until a general regulation shall be established among all the maritime powers of Europe, according to the protocol of the Congress of Aix-la-Chapelle, signed on the 9th November, 1818, by the terms of which it was agreed, by the ministers of the five great powers, Austria, France, Great Britain, Prussia, and Russia, that the existing regulations observed by them should be referred

(*l*) Bynkershoek, de Dominio Maris, cap. 2, 4. Martens, Précis du Droit des Gens Moderne de l'Europe, liv. iv. ch. 4, § 159. Klüber, Droit des Gens Moderne de l'Europe, pt. ii. tit. 1, ch. 3, §§ 117—122. [See U. S. Dipl. Cor. 1872, p. 202, where the United States complained of the Canadian flag being hoisted over the Union flag, on board a United States vessel captured for violating the fishing laws.]

to the ministerial conferences at London, and that the other maritime powers should be invited to communicate their views of the subject in order to form some such general regulation (*m*).

(*m*) J. H. W. Schlegel, Staats Recht des Königreichs Dänemark, 1 Theil, p. 412. Martens, Nouveau Recueil, tom. viii. p. 73. Ortolan, Diplomatie de la Mer, t. i. liv. 2, ch. 15.

CHAPTER IV.

RIGHTS OF PROPERTY.

§ 161. National proprietary rights.

THE exclusive right of every independent State to its territory and other property, is founded upon the title originally acquired by occupancy, conquest, or cession, and subsequently confirmed by the presumption arising from the lapse of time, or by treaties and other compacts with foreign States.

§ 162. Public and private property.

This exclusive right includes the public property or domain of the State, and those things belonging to private individuals, or bodies corporate, within its territorial limits.

§ 163. Eminent domain.

The right of the State to its public property or domain is *absolute*, and excludes that of its own subjects as well as other nations. The national proprietary right, in respect to those things belonging to private individuals, or bodies corporate, within its territorial limits, is *absolute*, so far as it excludes that of other nations; but, in respect to the members of the State, it is *paramount* only, and forms what is called the eminent domain (*a*); that is, the right, in case of necessity or for the public safety, of disposing of all the property of every kind within the limits of the State.

§ 164. Prescription.

The writers on natural law have questioned how far that peculiar species of presumption, arising from the lapse of time, which is called *prescription*, is justly applicable, as between nation and nation; but the constant and approved practice of nations shows that, by whatever name it be called, the uninterrupted possession of territory, or other property, for a certain length of time, by one State, excludes the claim of every other; in the same manner as, by the law of nature and the municipal code of every civilized nation, a similar possession by an individual excludes the claim of every other person to the article of property in question. This rule is founded

(*a*) Vattel, Droit des Gens, liv. i. ch. 20, §§ 235, 244. Rutherforth's Inst. of Natural Law, vol. ii. ch. 9, § 6. Heffter, Das Europäische Völkerrecht, §§ 64, 69, 70.

upon the supposition, confirmed by constant experience, that every person will naturally seek to enjoy that which belongs to him; and the inference fairly to be drawn from his silence and neglect, of the original defect of his title, or his intention to relinquish it (*b*).

§ 165. Conquest and discovery confirmed by compact and the lapse of time.

The title of almost all the nations of Europe to the territory now possessed by them, in that quarter of the world, was originally derived from conquest, which has been subsequently confirmed by long possession and international compacts, to which all the European States have successively become parties. Their claim to the possessions held by them in the New World, discovered by Columbus and other adventurers, and to the territories which they have acquired on the continents and islands of Africa and Asia, was originally derived from discovery, or conquest and colonization, and has since been confirmed in the same manner, by positive compact. Independently of these sources of title, the general consent of mankind has established the principle, that long and uninterrupted possession by one nation excludes the claim of every other. Whether this general consent be considered as an implied contract, or as positive law, all nations are equally bound by it; since all are parties to it, since none can safely disregard it without impugning its own title to its possessions, and since it is founded upon mutual utility, and tends to promote the general welfare of mankind.

§ 166. Papal Bull of 1493.

The Spaniards and Portuguese took the lead among the nations of Europe, in the splendid maritime discoveries in the East and the West, during the fifteenth and sixteenth centuries. According to the European ideas of that age, the heathen nations of the other quarters of the globe were the lawful spoil and prey of their civilized conquerors, and as between the Christian powers themselves, the Sovereign Pontiff was the supreme arbiter of conflicting claims. Hence the

(*b*) Grotius, de Jur. Bel. ac Pac. lib. ii. cap. 4. Puffendorf, Jus Naturæ et Gentium, lib. iv. cap. 12. Vattel, Droit des Gens, tome i. liv. ii. ch. 11. Rutherforth's Inst. of Natural Law, vol. i. ch. 8; vol. ii. ch. 9, §§ 3, 6.

"Sic qui rem suam ab alio teneri scit, nec quicquam contradicit multo tempore, is nisi causâ alia manifeste appareat, non videtur id alio fecisse animo, quàm quòd rem illam in suarum rerum numero esse nollet." Grotius in loc. cit.

[Calvo thinks acquisition by prescription more necessary for States than individuals. The latter can appeal to courts of law to decide upon their title, while the former too often resort to arms for the settlement of such differences. Droit International, vol. i. § 173.]

famous bull, issued by Pope Alexander VI., in 1493, by which he granted to the united crowns of Castile and Arragon all lands discovered, and to be discovered, beyond a line drawn from pole to pole, one hundred leagues west from the Azores, or Western Islands, under which Spain has since claimed to exclude all other European nations from the possession and use, not only of the lands but of the seas in the New World west of that line. Independent of this papal grant, the right of prior discovery was the foundation upon which the different European nations, by whom conquests and settlements were successively made on the American continent, rested their respective claims to appropriate its territory to the exclusive use of each nation. Even Spain did not found her pretension solely on the papal grant. Portugal asserted a title derived from discovery and conquest to a portion of South America; taking care to keep to the eastward of the line traced by the Pope, by which the globe seemed to be divided between these two great monarchies. On the other hand, Great Britain, France, and Holland, disregarded the pretended authority of the papal see, and pushed their discoveries, conquests, and settlements, both in the East and West Indies; until conflicting with the paramount claims of Spain and Portugal, they produced bloody and destructive wars between the different maritime powers of Europe. But there was one thing in which they all agreed, that of almost entirely disregarding the right of the native inhabitants of these regions. Thus the bull of Pope Alexander VI. reserved from the grant to Spain all lands, which had been previously occupied by any other *Christian* nation; and the patent granted by Henry VII. of England to John Cabot and his sons, authorized them "to seek out and discover all islands, regions, and provinces whatsoever, that may belong to heathens and infidels;" and "to subdue, occupy, and possess these territories, as his vassals and lieutenants." In the same manner, the grant from Queen Elizabeth to Sir Humphrey Gilbert empowers him to "discover such remote heathen and barbarous lands, countries, and territories, not actually possessed by any Christian prince or people, and to hold, occupy, and enjoy the same, with all their commodities, jurisdictions, and royalties." It thus became a maxim of policy and of law,

that the right of the native Indians was subordinate to that of the first Christian discoverer, whose paramount claim excluded that of every other civilized nation, and gradually extinguished that of the natives. In the various wars, treaties, and negotiations, to which the conflicting pretensions of the different States of Christendom to territory on the American continents have given rise, the primitive title of the Indians has been entirely overlooked, or left to be disposed of by the States within whose limits they happened to fall, by the stipulations of the treaties between the different European powers. Their title has thus been almost entirely extinguished by force of arms, or by voluntary compact, as the progress of cultivation gradually compelled the savage tenant of the forest to yield to the superior power and skill of his civilized invader (*c*).

§ 167 Dispute between Great Britain and Spain, relating to Nootka Sound.

In the dispute which took place in 1790, between Great Britain and Spain, relative to Nootka Sound, the latter claimed all the north-western coast of America as far north as Prince William's Sound, in latitude 61°, upon the ground of prior discovery and long possession, confirmed by the eighth article of the Treaty of Utrecht, referring to the state of possession in the time of his Catholic Majesty Charles II. This claim was contested by the British government, upon the principle that the earth is the common inheritance of mankind, of which each individual and each nation has a right to appropriate a share, by occupation and cultivation. This dispute was terminated by a convention between the two powers, stipulating that their respective subjects should not be disturbed in their navigation and fisheries in the Pacific Ocean or the South Seas, or in landing on the coasts of those seas, not already occupied, for the purpose of carrying on their commerce with the natives of the country, or of making settlements there, subject to the following provisions:—

1. That the British navigation and fishery should not be made the pretext for illicit trade with the Spanish settlements, and that British subjects should not navigate or fish within the space of ten marine leagues from any part of the coasts already occupied by Spain.

2. That in all parts of the north-western coasts of North

(*c*) *Johnson* v. *M'Intosh*, 8 Wheaton, 571—605.

America, or of the islands adjacent, situated to the north of the parts of the said coast already occupied by Spain, wherever the subjects of either of the two powers should have made settlements since the month of April, 1789, or should thereafter make any, the subjects of the other should have free access, and should carry on their trade without any disturbance or molestation.

3. That, with respect to the eastern and western coasts of South America, and the adjacent islands, no settlement should be formed thereafter, by the respective subjects, in such parts of those coasts as are situated to the south of those parts of the same coasts, and of the adjacent islands already occupied by Spain; provided that the respective subjects should retain the liberty of landing on the coasts and islands so situated, for the purposes of their fishery, and of erecting huts and other temporary buildings, for those purposes only (*d*).

§ 186. Controversy between the United States and Russia, respecting the north-western coast of America.

By an ukase of the Emperor Alexander of Russia, of the 4-16th September, 1821, an exclusive territorial right on the north-west coast of America was asserted as belonging to the Russian Empire, from Behring's Straits to the 51st degree of north latitude, and in the Aleutian Islands, on the east coast of Siberia, and the Kurile Islands, from the same straits to the South Cape in the Island of Ooroop, in 45° 51′ north latitude. The navigation and fishery of all other nations were prohibited in the islands, ports, and gulfs, within the above limits; and every foreign vessel was forbidden to touch at any of the Russian establishments above enumerated, or even to approach them, within a less distance than 100 Italian miles, under penalty of confiscation of the cargo. The proprietary rights of Russia to the extent of the north-west coast of America, specified in this decree, were rested upon the three bases said to be required by the general law of nations and immemorial usage; that is: upon the title of first discovery; upon the title of first occupation; and, in the last place, upon that which results from a peaceable and uncontested possession of more than half a century. It was

(*d*) Annual Register for 1790 (State Papers), pp. 285—305; 1791, pp. 208, 214, 222—227. Greenhow, History of Oregon and California, p. 466: Proofs and Illustrations, K. No. 1.

added, that the extent of sea, of which the Russian possessions on the continents of Asia and America form the limits comprehended all the conditions which were ordinarily attached to shut seas (*mers fermées*); and the Russian government might consequently deem itself authorized to exercise upon this sea the right of sovereignty, and especially that of entirely interdicting the entrance of foreigners. But it preferred only asserting its essential rights, by measures adapted to prevent contraband trade within the chartered limits of the American Russian Company.

All these grounds were contested, in point of fact as well as right, by the American government. The Secretary of State, Mr. John Q. Adams, in his reply to the communication of the Russian Minister at Washington, stated, that from the period of the existence of the United States as an independent nation, their vessels had freely navigated these seas, and the right to navigate them was a part of that independence; as was also the right of their citizens to trade, even in arms and munitions of war, with the aboriginal natives of the northwest coast of America, who were not under the territorial jurisdiction of other nations. He totally denied the Russian claim to any part of America south of the 55th degree of north latitude, on the ground that this parallel was declared, in the charter of the Russian American Company, to be the southern limit of the discoveries made by the Russians in 1799; since which period they had made no discoveries or establishments south of that line, on the coast claimed by them. With regard to the suggestion, that the Russian government might justly exercise sovereignty over the northern Pacific Ocean, as *mare clausum*, because it claimed territories both on the Asiatic and American coasts of that ocean, Mr. Adams merely observed, that the distance between those coasts on the parallel of 51 degrees, was not less than *four thousand miles;* and he concluded by expressing the persuasion of the American government, that the citizens of the United States would remain unmolested in the prosecution of their lawful commerce, and that no effect would be given to a prohibition, manifestly incompatible with their rights (*e*).

(*e*) Annual Register, vol. lxiv. pp. 576—584. Correspondence between Mr. Secretary Adams and Mr. Poletica.

§ 169. Convention of 1824, between the United States and Russia.

The negotiations on this subject were finally terminated by a convention between the two governments, signed at Petersburg, on the 5-17th April, 1821, containing the following stipulations:—

"Art. 1. It is agreed that, in any part of the great ocean, commonly called the Pacific Ocean or South Sea, the respective citizens or subjects of the high contracting powers shall be neither disturbed nor restrained, either in navigation or in fishing, or in the power of resorting to the coasts, upon points which may not already have been occupied, for the purpose of trading with the natives, saving always the restrictions and conditions determined by the following articles:—

"Art. 2. With the view of preventing the rights of navigation and of fishing, exercised upon the great ocean by the citizens and subjects of the high contracting powers, from becoming the pretext for an illicit trade, it is agreed that the citizens of the United States shall not resort to any point where there is a Russian establishment, without the permission of the governor or commander; and that, reciprocally, the subjects of Russia shall not resort, without permission, to any establishment of the United States upon the north-west coast.

"Art. 3. It is moreover agreed, that hereafter, there shall not be formed by the citizens of the United States, or under the authority of the said States, any establishment upon the north-west coast of America, nor in any of the islands adjacent, to the *north* of fifty-four degrees and forty minutes of north latitude; and that, in the same manner, there shall be none formed by Russian subjects, or under the authority of Russia, *south* of the same parallel.

"Art. 4. It is, nevertheless, understood, that, during a term of ten years, counting from the signature of the present Convention, the ships of both powers, or which belong to their citizens or subjects, respectively, may reciprocally frequent, without any hindrance whatever, the interior seas, gulfs, harbours, and creeks, upon the coast mentioned in the preceding article, for the purpose of fishing and trading with the natives of the country."

§ 170. Convention of 1825

Great Britain had also formally protested against the claims and principles set forth in the Russian ukase of 1821,

immediately on its promulgation, and subsequently at the Congress of Verona. The controversy, as between the British and Russian governments, was finally closed by a convention signed at Petersburg, February 16–28, 1825, which also established a permanent boundary between the territories respectively claimed by them on the continent and islands of North-western America.

between Great Britain and Russia.

This treaty contained the following stipulations:—

"Art. 1. It is agreed that the respective subjects of the high contracting parties shall not be troubled or molested in any part of the ocean commonly called the Pacific Ocean, either in navigating the same, in fishing therein, or in landing at such part of the coast as shall not have been already occupied, in order to trade with the natives, under the restrictions and conditions specified in the following articles:—

"Art. 2. In order to prevent the right of navigating and fishing, exercised upon the ocean by the subjects of the high contracting parties, from becoming the pretext for an illicit commerce, it is agreed that the subjects of his Britannic Majesty shall not land at any place where there may be a Russian establishment, without the permission of the governor or commandant; and, on the other hand, that Russian subjects shall not land, without permission, at any British establishment on the north-west coast."

By the 3rd and 4th articles it was agreed that "the line of demarcation between the possessions of the high contracting parties upon the coast of the continent and the islands of America to the north-west," should be drawn from the southernmost point of Prince of Wales's island, in latitude 54 degrees 40 minutes eastward, to the great inlet in the continent called Portland Channel, and along the middle of that inlet to the 56th degree of latitude, whence it should follow the summit of the mountains bordering the coast, within ten leagues north-westward, to Mount St. Elias, and thence north, in the course of the 141st meridian west from Greenwich, to the frozen ocean, "which line shall form the limit between the Russian and the British possessions in the continent of America to the north-west."

"Art. 5. It is, moreover, agreed that no establishment shall be formed by either of the two parties within the limits

assigned by the two preceding articles to the possessions of the other. Consequently, British subjects shall not form any establishment, either upon the coast, or upon the border of the continent comprised within the limits of the Russian possessions, as designated in the two preceding articles; and, in like manner, no establishment shall be formed by Russian subjects beyond the said limits.

"Art. 6. It is understood that the subjects of his Britannic Majesty, from whatever quarter they may arrive, whether from the ocean or from the interior of the continent, shall for ever enjoy the right of navigating freely, and without any hindrance whatever, all the rivers and streams which in their course towards the Pacific Ocean may cross the line of demarcation upon the line of coast described in article 3 of the present convention.

"Art. 7. It is also understood, that, for the space of ten years from the signature of the present Convention, the vessels of the two powers, or those belonging to their respective subjects, shall mutually be at liberty to frequent, without any hindrance whatever, all the inland seas, gulfs, havens, and creeks on the coast, mentioned in article 3, for the purpose of fishing and trading with the natives.

"Art. 8. The port of Sitka, or Novo Archangelsk, shall be open to the commerce and vessels of British subjects for the space of ten years, from the date of the exchange of the ratifications of the present Convention. In the event of an extension of this term being granted to any other power, the like extension shall be granted also to Great Britain.

"Art. 9. The above-mentioned liberty of commerce shall not apply to the trade in spirituous liquors, in fire-arms, or other arms, gunpowder or other warlike stores; the high contracting parties reciprocally engaging not to permit the above-mentioned articles to be sold or delivered, in any manner whatever, to the natives of the country."

The 10th and 11th articles contain regulations respecting British or Russian vessels, navigating the Pacific Ocean, and putting into the ports of the respective parties in distress; and for the settlement of all cases of complaint arising under the treaty (*f*).

(*f*) Greenhow, Hist. of Oregon, &c., p. 469, Proofs, I. No. 5.

§ 171. Expiration of the Convention of 1824 between the United States and Russia.

In the meantime, the period of ten years, established by the 4th article of the Convention between the United States and Russia, during which the vessels of both nations might frequent the bays, creeks, harbours, and other interior waters on the north-western coast of America, had expired. The Russian government had chosen to consider that article as the only limitation of its right to exclude American vessels from all parts of the division of the coast, on which the United States stipulated to form no establishments; disregarding entirely the 1st article of the Convention, by which all unoccupied places on the north-western-coast were declared free and open to the citizens or subjects of both parties—American vessels were consequently prohibited by the Russian authorities from trading on the unoccupied parts of that coast, north of the parallel of 54th degree 40 minutes. The American government protested against this prohibition, and at the same time, proposed to the Russian government to renew the stipulations of the Convention of 1824, for an indefinite period of time (*g*).

In the letter of instructions from the Secretary of State, Mr. Forsyth, to the American Minister at Petersburg, it was stated, that if the 4th article was to be considered as merely applicable to parts of the coast unoccupied, then it merely provided for the temporary enjoyment of a privilege which existed in perpetuity, under the law of nations, and which had been expressly declared so to exist by a previous article of the Convention. Containing, therefore, no provision not embraced in the preceding article, it would be useless and of no effect. But the rule in regard to the construction of an instrument, of whatever kind, was, that it should be so construed, if possible, as that every part may stand.

If the article were construed to include points of the coast already occupied, it then took effect, thus far, as a temporary exception to a perpetual prohibition, and the only consequence of the expiration of the term to which it was limited, would be the immediate and continued operation of the prohibition.

It was still more reasonable to understand it, however, as

(*g*) Greenhow, pp. 343—361.

intended to grant permission to enter interior bays, &c., at the mouths of which there might be establishments, or the shores of which might be, in part, but not wholly, occupied by such establishments, thus providing for a case which would otherwise admit of doubt, as without the 4th article it would be questionable whether the bays, &c., described in it belonged to the first or second article.

In no sense could it be understood as implying an acknowledgment, on the part of the United States, of the right of Russia to the possession of the coast above the latitude of 54 degrees 40 minutes north. It must be taken in connection with the other articles of the Convention, which had, in fact, no reference whatever to the question of the right of possession of the unoccupied part of the coast. In a spirit of compromise, and to prevent future collisions or difficulties, it was agreed that no new establishments should be formed by the respective parties to the north or south of a certain parallel of latitude, after the conclusion of the agreement; but the question of the right of possession beyond the existing establishments, as it subsisted previously to, or at the time of the conclusion of the convention, was left untouched. The United States, in agreeing not to form new establishments to the north of latitude 54 degrees 40 minutes north, made no acknowledgment of the right of Russia to the territory above that line. If such an admission had been made, Russia, by the same construction of the article, must have acknowledged the right of the United States to the territory south of the designated line. But that Russia did not so understand the article, was conclusively proved by her having entered into a similar agreement in a subsequent treaty (1825) with Great Britain; and having, in fact, acknowledged in that instrument the right of the same territory by Great Britain. The United States could only be considered as acknowledging the right of Russia to acquire, by actual occupation, a just claim to unoccupied lands above the latitude 54 degrees 40 minutes north; and even this was mere matter of inference, as the Convention of 1824 contains nothing more than a negation of the right of the United States to occupy new points within that limit.

Admitting that this inference was just, and was in contem-

plation of the parties to the Convention, it would not follow that the United States ever intended to abandon the just right acknowledged by the first article to belong to them under the law of nations, *i.e.* to frequent any part of the unoccupied coasts of North America, for the purpose of fishing or trading with the natives. All that the Convention admitted was an inference of the right of Russia to acquire possession by settlement north of 54 degrees 40 minutes north. Until that actual possession was taken, the first article of the Convention acknowledged the right of the United States to fish and trade as prior to its negotiation. This was not only the just construction, but it was the one both parties were interested in putting upon the instrument, as the benefits were equal and mutual, and the object of the Convention, to avoid converting the exercise of the common right into a dispute about exclusive privilege, was secured by it.

These arguments were not controverted by the Russian cabinet, which, however, declined the proposition for a renewal of the engagements contained in the 4th article, and the matter still rests on the same footing (*h*).

§ 172. Claim of the United States to the Oregon territory.

The claim of the United States to the territory between the Rocky Mountains and the Pacific Ocean, and between the 42nd degree and 54th degree and 40 minutes of north latitude, is rested by them upon the following grounds:—

1. The first discovery of the mouth of the river Columbia by Captain Gray, of Boston, in 1792; the first discovery of the sources of that river, and the exploration of its course to the sea, by Captains Lewis and Clarke, in 1805—6; and the establishment of the first posts and settlements in the territory in question by citizens of the United States.

2. The virtual recognition by the British government of the title of the United States in the restitution of the settlement of Astoria or Fort George, at the mouth of the Columbia River, which had been captured by the British during the late war between the two countries, and which was restored in virtue of the 1st article of the treaty of Ghent, 1814, stipulating that "all territory, places, and possessions whatever, taken by either party from the other during the war," &c.,

(*h*) Mr. Forsyth's letter to Mr. Dallas, Nov. 3, 1837. Congress Documents, Sess. 1838—9, vol. i. p. 36. Greenhow, pp. 361—363.

"shall be restored without delay." This restitution was made, without any reservation or exception whatsoever, communicated at the time to the American government.

3. The acquisition by the United States of all the titles of Spain, which titles were derived from the discovery of the coasts of the region in question, by Spanish subjects, before they had been seen by the people of any other civilized nation. By the 3rd article of the treaty of 1819, between the United States and Spain, the boundary line between the two countries, west of the Mississippi, was established from the mouth of the river Sabine, to certain points on the Red River and the Arkansas, and running along the parallel of 42 degrees north of the South Sea; his Catholic Majesty ceding to the United States "all his rights, claims, and pretensions, to any territories east and north of the said line; and" renouncing "for himself, his heirs and successors, all claim to the said territories forever." The boundary thus agreed on with Spain was confirmed by the treaty of 1828, between the United States and Mexico, which had, in the meantime, become independent of Spain.

4. Upon the ground of *contiguity*, which should give to the United States a stronger right to those territories than could be advanced by any other power. "If," said Mr. Gallatin, "a few trading factories on the shores of Hudson's Bay have been considered by Great Britain as giving an exclusive right of occupancy as far as the Rocky Mountains; if the infant settlements on the more southern Atlantic shores justified a claim thence to the South Seas, and which was actually enforced to the Mississippi; that of the millions of American citizens already within reach of those seas, cannot consistently be rejected. It will not be denied that the extent of contiguous country to which an actual settlement gives a prior right, must depend, in a considerable degree, on the magnitude and population of that settlement, and on the facility with which the vacant adjacent land may, within a short time, be occupied, settled, and cultivated by such population, compared with the probability of its being occupied and settled from any other quarter. This doctrine was admitted to its fullest extent by Great Britain, as appeared by all her charters, extending from the Atlantic to the Pacific, given to colonies

established then only on the borders of the Atlantic. How much more natural and stronger the claim, when made by a nation whose population extended to the central parts of the continent, and whose dominions were by all acknowledged to extend to the Rocky Mountains."

§ 173. Claims of England.

The exclusive claim of the United States is opposed by Great Britain on the following grounds:—

1. That the Columbia was not discovered by Gray, who had only entered its mouth, discovered four years previously by Lieutenant Meares of the British navy; and that the exploration of the interior borders of the Columbia by Lewis and Clarke could not be considered as confirming the claim of the United States, because, if not before, at least in the same and subsequent years, the British Northwest Company had, by means of their agents, already established their posts on the head waters or main branch of the river.

2. That the restitution of Astoria, in 1818, was accompanied by express reservations of the claim of Great Britain to that territory, upon which the American settlement must be considered an encroachment.

3. That the titles to the territory in question, derived by the United States from Spain through the treaty of 1819, amounted to nothing more than the rights secured to Spain equally with Great Britain by the Nootka Sound Convention of 1790: namely, to settle on any part of those countries, to navigate and fish in their waters, and to trade with the natives.

4. That the charters granted by British sovereigns to colonies on the Atlantic coasts were nothing more than cessions to the grantees of whatever rights the grantor might consider himself to possess, and could not be considered as binding the subjects of any other nation, or as part of the law of nations, until they had been confirmed by treaties.

§ 174. Negotiation of 1827.

During the negotiation of 1827, the British plenipotentiaries, Messrs. Huskisson and Addington, presented the pretensions of their government in respect to the territory in question in a statement, of which the following is a summary.

"Great Britain claims no exclusive sovereignty over any portion of the territory on the Pacific, between the 42nd and the 49th parallels of latitude. Her present claim, not in

respect to any part, but to the whole, is limited to a right of joint occupancy, in common with other States, leaving the right of exclusive dominion in *abeyance;* and her pretensions tend to the mere maintenance of her own rights, in resistance to the exclusive character of the pretensions of the United States.

"The rights of Great Britain are recorded and defined in the Convention of 1790. They embrace the right to navigate the waters of those countries, to settle in and over any part of them, and to trade with the inhabitants and occupiers of the same. These rights have been peaceably exercised ever since the date of that Convention; that is, for a period of nearly forty years. Under that Convention, valuable British interests have grown up in those countries. It is admitted that the United States possess the same rights, although they have been exercised by them only in a single instance, and have not, since the year 1813, been exercised at all; but beyond those rights they possess none.

"In the interior of the territory in question, the subjects of Great Britain have had, for many years, numerous settlements and trading-posts; several of these posts are on the tributary waters of the Columbia; several upon the Columbia itself; some to the northward, and others to the southward of that river. And they navigate the Columbia as the sole channel for the conveyance of their produce to the British stations nearest to the sea, and for its shipment thence to Great Britain; it is also by the Columbia and its tributary streams that these posts and settlements receive their annual supplies from Great Britain.

"To the interests and establishments which British industry and enterprise have created, Great Britain owes protection; that protection will be given, both as regards settlement, and freedom of trade and navigation, with every attention not to infringe the co-ordinate rights of the United States; it being the desire of the British government, so long as the joint occupancy continues, to regulate its own obligations by the same rules which govern the obligations of every other occupying party" (*i*).

(*i*) Congress Documents, 20th Cong. and 1st Sess. No. 199. Greenhow, Proofs and Illustrations, H.

§ 175. Convention of 1818.

By the 3rd article of the Convention between the United States and Great Britain, in 1818, it was "agreed, that any country that may be claimed by either party, on the north-west coast of America, westward of the Stony Mountains, shall, together with its harbours, bays, and creeks, and the navigation of all rivers within the same, be free and open, for the term of ten years from the date of the signature of the present Convention, to the vessels, citizens, and subjects of the two powers; it being well understood that this agreement is not to be construed to the prejudice of any claim which either of the two high contracting parties may have to any part of the said country, nor shall it be taken to affect the claims of any other power or State to any part of the said country; the only object of the high contracting parties, in that respect, being to prevent disputes and differences amongst themselves."

In 1827, another Convention was concluded between the two parties, by which it was agreed:—

"Art. 1. All the provisions of the third article of the Convention concluded between the United States of America and His Majesty the King of the United Kingdom of Great Britain and Ireland, on the 20th of October, 1818, shall be, and they are hereby further indefinitely extended and continued in force, in the same manner as if all the provisions of the said article were herein specifically recited.

"Art. 2. It shall be competent, however, to either of the contracting parties, in case either should think fit at any time after the 20th of October, 1828, on giving due notice of twelve months to the other contracting party, to annul and abrogate this Convention; and it shall, in such case, be accordingly entirely annulled and abrogated, after the expiration of the said term of notice.

"Art. 3. Nothing contained in this Convention, or in the third article of the Convention of the 20th of October, 1818, hereby continued in force, shall be construed to impair, or in any manner affect, the claims which either of the contracting parties may have to any part of the country westward of the Stony or Rocky Mountains" (*k*).

(*k*) Elliot's American Diplomatic Code, vol. i. pp. 282—330.

§ 176. Treaty of 1846.

The notification provided for by the Convention having been given by the American government, new discussions took place between the two governments, which were terminated by a treaty concluded at Washington, in 1846. By the first article of that treaty it was stipulated, that from the point on the 49th parallel of north latitude, where the boundary laid down in existing treaties and conventions between the United States and Great Britain terminates, the line of boundary shall be continued westward along the said 49th parallel of north latitude to the middle of the channel which separates the continent from Vancouver's Island, and thence southerly through the middle of the said channel, and of Fucas Straits, to the Pacific Ocean; provided, however, that the navigation of the whole of the said channel and straits, south of the 49th parallel of north latitude, remain free and open to both parties. The second article stipulated for the free navigation of the Columbia River by the Hudson's Bay Company, and the British subjects trading with them, from the 49th degree of north latitude to the ocean. The third article provided that the possessory rights of the Hudson's Bay Company, and of all other British subjects, to the territory south of the parallel of the 49th degree of north latitude, should be respected (*l*).

§ 176a. Arbitration before the Emperor of Germany.

The treaty of 1846 did not, however, completely settle the question. It was only terminated in 1872 by being submitted to the award of the Emperor of Germany as arbitrator. The 34th Article of the Treaty of Washington, 8th of May, 1871, after referring to the Treaty of 1846, and stating that the Commissioners appointed to determine that portion of the boundary which runs southerly through the middle of the channel separating Vancouver's Island from the Continent, and of Fuca Straits to the Pacific Ocean, were unable to agree, provides "that the respective claims of the government of Her Britannic Majesty, and the government of the United States, shall be submitted to the arbitration and award of His Majesty the Emperor of Germany, who, having regard to the above-mentioned Article of the said Treaty, shall decide thereupon finally, and without appeal, which of these claims is most in accordance with the true interpretation of the Treaty of June 15, 1846" (*m*).

Great Britain contended that the boundary line should be run through the Rosario Strait, while the United States asserted that it should be run through the Canal de Haro. The position of the boundary was a matter of considerable importance, not only in assigning several islands to the successful party, but also in settling the rights of ownership over

(*l*) [United States Statutes at Large, vol. ix. pp. 109, 869].
(*m*) [Parl. Papers, N. America, No. 3 (1873), p. 1, see Appendix E].

the navigable channels between Vancouver's Island and the mainland. The whole question turned upon the interpretation to be put on the existing treaties. Cases and counter cases were submitted by each government to the Emperor of Germany, and on the 21st October, 1872, His Imperial Majesty awarded that "The claim of the government of the United States, viz., that the line of boundary between the dominions of Her Britannic Majesty and the United States should be run through the Canal of Haro, is most in accordance with the true interpretation of the Treaty" of 1846 (*n*).

§ 177. Maritime territorial jurisdiction.

The maritime territory of every State extends to the ports, harbours, bays, mouths of rivers, and adjacent parts of the sea enclosed by headlands belonging to the same State. The general usage of nations superadds to this extent of territorial jurisdiction a distance of a marine league, or as far as a cannon shot will reach from the shore along all the coasts of the State. Within these limits, its rights of property and territorial jurisdiction are absolute, and exclude those of every other nation (*o*).

§ 177a. The Case of *The Franconia*.

The extent and nature of the jurisdiction of a State over its territorial waters has been much discussed of late. In the well-known case of *The Franconia* the court held that it had no jurisdiction over a criminal offence committed by a foreigner on board a foreign ship which was on the open sea but within three miles of the coast of England. The difficulty and doubt surrounding the question is shown by the fact that of the fourteen judges who attended during the arguments in *The Franconia* seven pronounced against the jurisdiction, while six claimed it. One who agreed with the majority died before judgment was delivered (*p*). The decision, therefore, cannot be considered as altogether satisfactory, but the question has now been set at rest, as far as English law is concerned, by an Act of Parliament passed in 1878, and which is referred to below.

§ 177b. Publicists do not agree.

No precise rule can be derived from the writings of publicists. The suggestion of Bynkershoek given in the text, that the sea, as far as a cannon shot will reach from the shore, should belong to the State it borders, has been adopted by many writers, and has generally been assumed to be a distance of three miles. It is evident, however, that on this assumption, consistency requires the limit to be increased in pro-

(*n*) [Parl. Papers, N. America, No. 9 (1873), p. 3. See Cusling, The Treaty of Washington, p. 203].

(*o*) Grotius, de Jur. Bel. ac Pac. lib. ii. cap. 3, § x. Bynkershoek, Quæst. Jur. Pub. lib. i. cap. 8. De Dominio Maris, cap. 2. Vattel. liv. i. ch. 23, § 289. Valin, Comm. sur l'Ordonnance de la Marine, liv. v. tit. 1. Azuni, Diritto Marit. pt. i. cap. 2, art. 3, § 15. Galiani, dei Doveri dei Principi Neutrali in Tempo de Guerra, liv. i. Life and Works of Sir L. Jenkins, vol. ii. p. 780.

(*p*) [*R.* v. *Keyn* (*The Franconia*), 2 Ex. D. 63].

portion to the increased range of modern artillery. But in the practical application of the rule, in respect of the particular distance, and in the still more essential particular of the character and degree of sovereignty and dominion to be exercised, a great difference of opinion is to be found. The only point upon which publicists are more or less unanimous, is that *some* zone of sea (most of them fix it at three miles), is for *some* purposes subject to the dominions of the local State. "Even if entire unanimity had existed," said Sir A. Cockburn in *The Franconia* (*q*), "the question would still remain how far the law, as stated by the publicists, had received the assent of the civilized nations of the world. . . . The question is not one of theoretical opinion, but of fact, and fortunately, the writers upon whose statements we are called upon to act, have afforded us the means of testing those statements by a reference to facts. They refer us to two things, and to these alone—treaties and usage. Let us look a little more closely into both. First, then, let us see how the matter stands as regards treaties. It may be asserted, without fear of contradiction, that the rule that the sea surrounding the coast is to be treated as a part of the adjacent territory, so that the State shall have exclusive dominion over it, and that the law of the latter shall be generally applicable to those passing over it in ships of other nations, has never been made the subject-matter of any treaty, or, as matter of acknowledged right, has formed the basis of any treaty, or has even been the subject of diplomatic discussion.... When the treaties referred to by text writers are looked at, they will be found to relate to two subjects only,—the observance of the rights and obligations of neutrality, and the exclusive right of fishing." In these respects nations have followed text writers, and adopted three miles as a convenient distance, not as matter of existing right, but as matter of mutual concession and convention. Such treaties would be superfluous, if the general assent of nations had given to each a three-mile belt of the sea surrounding its shores. As regards usage, "the only usage found to exist, is such as is connected with navigation, or with revenue, local fisheries, or neutrality, and it is to these alone that the usage relied on is confined." The Lord Chief Justice came to the conclusion that though the three-mile belt of sea could not be considered as then belonging to the State it bordered for all purposes, yet if the State by legislation or some outward manifestation of the national will made this part of the sea its own, so as to make foreigners within it subject to its law, this would not be considered as infringing the rights of other States.

Opinion of Cockburn, C.J.

§ 177c. Territorial Waters Jurisdiction Act, 1878.

In consequence of this decision, the Territorial Waters Jurisdiction Act, 1878, (*r*) was passed. By this Act, "An offence committed by a person, whether he is or is not a subject of Her Majesty, on the open sea within the territorial waters of Her Majesty's dominions, is an offence within the jurisdiction of the Admiral, although it may have been committed on board or by means of a foreign ship, and the person who committed such offence may be arrested, tried, and punished accordingly." "'The territorial waters of Her Majesty's dominions,' in reference to the sea, means such part of the sea adjacent to the coast of the United Kingdom, or the coast of some other part of Her Majesty's

(*q*) [2 Ex. D. 202]. (*r*) [41 & 42 Vict. c. 73. See Appendix H. p. 733].

dominions, as is deemed by international law to be within the territorial sovereignty of Her Majesty; and for the purpose of any offence declared by this Act to be within the jurisdiction of the Admiral, any part of the open sea within one marine league of the coast measured from low-water mark shall be deemed to be open sea within the territorial waters of Her Majesty's dominions."

§ 177d. Extension of three-mile belt.

Other States may in time adopt a similar course, and claim as their own the three-mile belt of sea for all purposes of jurisdiction, but it seems improbable that this limit will be extended further. Spain has, on more than one occasion, put forward a claim to exercise maritime jurisdiction at a distance of two leagues, or six nautical miles from the Spanish coast. Other nations have, however, resisted this claim. In 1874, Lord Derby intimated to the Spanish government, that their pretensions would not be submitted to by Great Britain, and that any attempt to carry them out would lead to very serious consequences (*s*). Mr. Fish also stated, on the part of the United States government, "We have always understood and asserted that, pursuant to public law, no nation can rightfully claim jurisdiction at sea beyond a marine league from its coast" (*t*).

§ 178. Extent of the term *coasts* or *shore*.

The term "coasts" includes the natural appendages of the territory which rise out of the water, although these islands are not of sufficient firmness to be inhabited or fortified; but it does not properly comprehend all the shoals which form sunken continuations of the land perpetually covered with water. The rule of law on this subject is *terræ dominium ubi finitur armorum vis;* and since the introduction of firearms, that distance has usually been recognized to be about three miles from the shore. In a case before Sir W. Scott (Lord Stowell) respecting the legality of a capture alleged to be made within the neutral territory of the United States, at the mouth of the river Mississippi, a question arose as to what was to be deemed the shore, since there are a number of little mud islands, composed of earth and trees drifted down by the river, which form a kind of portico to the main land. It was contended that these were not to be considered as any part of the American territory—that they were a sort of "no man's land," not of consistency enough to support the purposes of life, uninhabited, and resorted to only for shooting and taking birds' nests. It was argued that the line of territory was to be taken only from the Balize, which is a fort raised on made land by the former Spanish possessors. But the learned judge was of a different opinion, and determined

(*s*) [Lord Derby to Mr. Watson, 25th Dec. 1874; U. S. Dipl. Cor. 1875, p. 641].

(*t*) [U. S. Dipl. Cor. 1875, p. 649].

that the protection of the territory was to be reckoned from these islands, and that they are the natural appendages of the coast on which they border, and from which indeed they were formed. Their elements were derived immediately from the territory, and on the principle of alluvium and increment, on which so much is to be found in the books of law, *Quod vis fluminis de tuo prædio detraxerit, et vicino prædio attulerit, palam tuum remanet*, even if it had been carried over to an adjoining territory. Whether they were composed of earth or solid rock would not vary the right of dominion, for the right of dominion does not depend upon the texture of the soil (*u*).

§ 179. The King's Chambers.

The exclusive territorial jurisdiction of the British crown over the enclosed parts of the sea along the coasts of the island of Great Britain has immemorially extended to those bays called the *King's Chambers; i.e.*, portions of the sea cut off by lines drawn from one promontory to another. A similar jurisdiction is also asserted by the United States over the Delaware Bay and other bays and estuaries forming portions of their territory. It appears from Sir Leoline Jenkins, that both in the reigns of James I. and of Charles II. the security of British commerce was provided for by express prohibitions against the roving or hovering of foreign ships of war so near the neutral coasts and harbours of Great Britain as to disturb or threaten vessels homeward or outward bound; and that captures by such foreign cruisers, even of their enemies' vessels, would be restored by the Court of Admiralty if made within the King's Chambers. So also the British "hovering act," passed in 1736 (9 Geo. II. cap. 35), assumes, for certain revenue purposes, a jurisdiction of four leagues from the coasts, by prohibiting foreign goods to be transhipped within that distance without payment of duties. A similar provision is contained in the revenue laws of the United States; and both these provisions have been declared by judicial authority, in each country, to be consistent with the law and usage of nations (*x*).

(*u*) *The Anna*, 5 C. Rob. 385 (*c*).

(*x*) Life and Works of Sir L. Jenkins, vol. ii. pp. 727, 728, 780. Opinion of the United States Attorney-General on the capture of the British ship *Grange* in the Delaware Bay, 1793. Waite's American State Papers, vol. i. p. 75. *Le Louis*, 2 Dods. Ad. 245; *Church* v. *Hubbard*, 2 Cranch, 187. Vattel, Droit des Gens, liv. i. ch. 22, § 281.

§ 179a. Customs legislation at the present time.

The British "Hovering Act" has been long since repealed. The present customs legislation makes a distinction as regards the extent of jurisdiction claimed for revenue purposes, between ships belonging to British subjects and ships belonging to foreigners. Thus it is now enacted that "If any ship or boat shall be found or discovered to have been within any port, bay, harbour, river, or creek of the United Kingdom, or the Channel Islands, or within *three leagues* of the coast thereof, if belonging wholly or in part to British subjects, or having half the persons on board subjects of Her Majesty, or within *one league if not British*, having false bulkheads, &c.," she shall be liable to forfeiture, or to be dealt with as the statute directs. The distinction is also maintained for individuals; thus every person found to have been on board a ship liable to forfeiture, "within three leagues of the coast if a British subject, or within one league if a foreigner," shall forfeit a sum not exceeding £100 (*y*). Any officer of customs may go on board any ship after clearance outwards within one league of the coast of the United Kingdom, and demand the ship's clearance, which the master must produce, or be liable to a penalty of £500 (*z*).

§ 180. Right of fishery.

The right of fishing in the waters adjacent to the coasts of any nation, within its territorial limits, belongs exclusively to the subjects of the State. The exercise of this right, between France and Great Britain, was regulated by a Convention concluded between these two powers, in 1839; by the 9th article of which it is provided, that French subjects shall enjoy the exclusive right of fishing along the whole extent of the coasts of France, within the distance of three geographical miles from the shore, at low water-mark, and that British subjects shall enjoy the same exclusive right along the whole extent of the coasts of the British Islands, within the same distance; it being understood, that upon that part of the coasts of France lying between Cape Carteret and the point of Monga, the exclusive right of French subjects shall only extend to the fishery within the limits mentioned in the first article of the Convention; it being also understood, that the distance of three miles, limiting the exclusive right of fishing upon the coasts of the two countries, shall be measured, in respect to bays of which the opening shall not exceed ten miles, by a straight line drawn from one cape to the other (*a*).

By the 1st article of the Convention of 1818, between the

(*y*) [The Customs Consolidation Act, 1876, sect. 179].
(*z*) [Ibid. sect. 134. As to what is a clearance, see Parl. Papers, 1873, N. America (No. 2), p. 113].
(*a*) Annales Maritimes et Coloniales, 1839, 1re Partie, p. 861.

United States and Great Britain, reciting, that "whereas differences have arisen respecting the liberty claimed by the United States, for the inhabitants thereof to take, dry, and cure fish, on certain coasts, bays, harbours, and creeks, of his Britannic Majesty's dominions in America," it was agreed between the contracting parties, "that the inhabitants of the said United States shall have, forever, in common with the subjects of his Britannic Majesty, the liberty to take fish of every kind on that part of the southern coast of Newfoundland, which extends from Cape Ray to the Rameau Islands, on the western and northern coast of Newfoundland, from the said Cape Ray to the Quirpon Islands; on the shores of the Magdalen Islands; and also on the coasts, bays, harbours, and creeks, from Mount Joly, on the southern coast of Labrador, to and through the Straits of Belleisle, and thence northwardly indefinitely along the coast; without prejudice, however, to any of the exclusive rights of the Hudson Bay Company. And that the American fishermen shall also have liberty, forever, to dry and cure fish in any of the unsettled bays, harbours, and creeks, of the southern part of the coast of Newfoundland, here above described, and of the coast of Labrador; but so soon as the same, or any portion thereof, shall be settled, it shall not be lawful for the said fishermen to dry or cure fish at such portion so settled, without previous agreement for such purpose with the inhabitants, proprietors, or possessors of the ground. And the United States hereby renounce forever any liberty heretofore enjoyed or claimed by the inhabitants thereof, to take, dry, or cure fish, on or within three marine miles of any of the coasts, bays, creeks, or harbours, of his Britannic Majesty's dominions in America, not included within the above-mentioned limits. Provided, however, that the American fishermen shall be admitted to enter such bays or harbours, for the purpose of shelter, and of repairing damages therein, of purchasing wood, and of obtaining water, and for no other purpose whatever. But they shall be under such restrictions as may be necessary to prevent their taking, drying, or curing fish therein, or in any other manner whatever abusing the privileges hereby reserved to them (*b*).

(*b*) Elliot's Diplomatic Code, vol. i. p. 281.

§ 180a. Treaty of 1854.

Another treaty was negotiated in 1854 on the basis of reciprocity, that is, the subjects of each State were permitted to fish in the waters of the other, and the produce was admitted into both countries free of duty. This treaty came to an end in 1866, through notice of terminating it being given by the United States; and the question is, for the time being, regulated by the Treaty of Washington. By Art. XVIII. of the latter convention, the inhabitants of the United States have, in addition to their rights under the treaty of 1818, in common with British subjects, for the term of ten years from the date when the treaty came into force, and further, until after two years' notice of terminating the treaty has been given by either party, the liberty to take fish of every kind, except shell-fish, on the sea-coasts and shores, and in the bays, harbours, and creeks of the Provinces of Quebec, Nova Scotia, and New Brunswick, and the Colony of Prince Edward's Island, and of the several islands thereunto adjacent, without being restricted to any distance from the shore; with permission to land upon the said coasts and shores and islands, and also upon the Magdalen Islands, for the purpose of drying their nets and curing their fish. This only applies to sea-fishing; salmon and other river-fishing being reserved exclusively for British fishermen. Art. XIX. gives to British subjects corresponding rights, on the same terms, on the eastern sea-coasts and shores of the United States north of the 39th parallel of N. lat. As long as the treaty is in force, fish-oil and fish of all kinds (except fish of the inland lakes, and of the rivers falling into them, and except fish preserved in oil), being the produce of Canadian or United States fisheries, shall be admitted into each country, respectively, free of duty (*c*). It being asserted that this treaty gave a greater advantage to American than to British subjects, a Commission was appointed to settle what compensation, if any, should be paid by the United States to England; and on the 23rd of November, 1877, the Commission, which met at Halifax, awarded that the sum of 5,500,000 dollars in gold be so paid. Some difficulties were raised by the United States as to complying with the award; but the money was ultimately paid (*d*).

Treaty of Washington, 1871.

§ 181. Claims to portions of the sea upon the ground of prescription.

Besides those bays, gulfs, straits, mouths of rivers, and estuaries which are enclosed by capes and headlands belonging to the territory of the State, a jurisdiction and right of property over certain other portions of the sea have been claimed by different nations, on the ground of immemorial use. Such, for example, was the sovereignty formerly claimed by the Republic of Venice over the Adriatic. The maritime supremacy claimed by Great Britain over what are called the Narrow Seas has generally been asserted merely by requiring certain honours to the British flag in those seas, which have

(*c*) [The Treaty of Washington, 1871, arts. xviii. xix. xxi. See 35 & 36 Vict. c. 45. See also Appendix, E, p. 688].

(*d*) [See London Gazette, 16th Nov., 1878, Supplement].

been rendered or refused by other nations, according to circumstances, but the claim itself has never been sanctioned by general acquiescence (*e*).

Straits are passages communicating from one sea to another. If the navigation of the two seas thus connected is free, the navigation of the channel by which they are connected ought also to be free. Even if such strait be bounded on both sides by the territory of the same sovereign, and is at the same time so narrow as to be commanded by cannon shot from both shores, the exclusive territorial jurisdiction of that sovereign over such strait is controlled by the right of other nations to communicate with the seas thus connected. Such right may, however, be modified by special compact, adopting those regulations which are indispensably necessary to the security of the State whose interior waters thus form the channel of communication between different seas, the navigation of which is free to other nations. Thus the passage of the strait may remain free to the private merchant vessels of those nations having a right to navigate the seas it connects, whilst it is shut to all foreign armed ships in time of peace.

§ 182. The Black Sea, the Bosphorus, and the Dardanelles.

So long as the shores of the Black Sea were exclusively possessed by Turkey, that sea might with propriety be considered a *mare clausum;* and there seems no reason to question the right of the Ottoman Porte to exclude other nations from navigating the passage which connects it with the Mediterranean, both shores of this passage being at the same time portions of the Turkish territory; but since the territoral acquisitions made by Russia, and the commercial establishments formed by her on the shores of the Euxine, both that empire and the other maritime powers have become entitled to participate in the commerce of the Black Sea, and consequently to the free navigation of the Dardanelles and the Bosphorus. This right was expressly recognized by the seventh article of the Treaty of Adrianople, concluded in 1829, between Russia and the Porte, both as to Russian vessels and those of other European States in amity with Turkey (*f*).

(*e*) Vattel, Droit des Gens, liv. i. ch. 23, § 289. Martens, Précis du Droit des Gens Moderne de l'Europe, liv. ii. ch. 1, § 42. *Edinburgh Review*, vol. xi. art. 1, pp. 17—19. Wheaton's Hist. Law of Nations, pp. 154—157. Klüber, § 132.

(*f*) Martens, Nouveau Recueil, tom. viii. p. 143.

The right of foreign vessels to navigate the interior waters of Turkey, which connect the Black Sea with the Mediterranean, does not extend to ships of war. The ancient rule of the Ottoman Empire, established for its own security, by which the entry of foreign vessels of war into the canal of Constantinople, including the Strait of the Dardanelles and that of the Black Sea, has been at all times prohibited, was expressly recognized by the treaty concluded at London the 13th July, 1841, between the five great European Powers and the Ottoman Porte.

By the 1st article of this treaty, the Sultan declared his firm resolution to maintain, in future, the principle invariably established as the ancient rule of his empire; and that so long as the Porte should be at peace, he would admit no foreign vessel of war into the said Straits. The five Powers, on the other hand, engaged to respect this determination of the Sultan, and to conform to the above-mentioned principle.

By the 2nd article it was provided, that, in declaring the inviolability of this ancient rule of the Ottoman Empire, the Sultan reserved the faculty of granting, as heretofore, firmans allowing the passage to light-armed vessels employed according to usage, in the service of the diplomatic legations of friendly powers.

By the 3rd article, the Sultan also reserved the faculty of notifying this treaty to all the powers in amity with the Sublime Porte, and of inviting them to accede to it (*g*).

§ 182a. Treaty of Paris, 1856.

The treaty of 1841 was revised by the Treaty of Paris (*h*), but the principles contained in the former treaty were re-established with very slight changes. The Sultan, however, agreed to permit the passage of light ships of war, which the contracting parties were authorized to station at the mouths of the Danube, in order to secure the execution of the regulations relative to the liberty of that river (*i*). The Treaty of Paris provided for the neutralization of the Black Sea, by excluding from it ships of war of every flag. Russia and Turkey also agreed not to establish any military-maritime arsenals on its coasts (*k*).

Convention of 1871.

These latter provisions were, however, abrogated in 1871, and a declaration was then made by the Powers that "the principle of the

(*g*) Wheaton's Hist. Law of Nations, pp. 583—585.
(*h*) [Art. x. Hertslet, Map of Europe by Treaty, vol. ii. p. 1255].
(*i*) [Convention of 30th March, 1856, art. iii. Ibid. p. 1268].
(*k*) [Arts. xi. xiii. See these treaties in Appendix F.].

closing of the Straits, such as it has been established, is maintained," but that power should be given to the Sultan "to open the Straits in time of peace to the vessels of war of friendly and allied Powers, in case the Sublime Porte should judge it necessary in order to secure the execution of the stipulations of the Treaty of Paris, 1856" (*l*). The abrogation of the article in the Treaty of Paris preventing the building of arsenals, also gave both Turkey and Russia the power of forming such establishments on the coasts of the Black Sea. Article III. of this convention declares that "The Black Sea remains open, as heretofore, to the mercantile marine of all nations."

§ 183. Danish sovereignty over the Sound and the Belts.

The supremacy asserted by the King of Denmark over the Sound and the two Belts which form the outlet of the Baltic Sea into the ocean, is rested by the Danish public jurists upon immemorial prescription, sanctioned by a long succession of treaties with other powers. According to these writers, the Danish claim of sovereignty has been exercised from the earliest times beneficially for the protection of commerce against pirates and other enemies by means of guard-ships, and against the perils of the sea by the establishment of lights and land-marks. The Danes continued for several centuries masters of the coasts on both sides of the Sound, the province of Scania not having been ceded to Sweden until the treaty of Roeskild in 1658, confirmed by that of 1660, in which it was stipulated that Sweden should never lay claim to the Sound tolls in consequence of the cession, but should content herself with a compensation for keeping up the light-houses on the coast of Scania. The exclusive right of Denmark was recognized as early as 1368, by a treaty with the Hanseatic republics, and by that of 1490, with Henry VII. of England, which forbids English vessels from passing the Great Belt as well as the Sound, unless in case of unavoidable necessity; in which case they were to pay the same duties at Wyborg as if they had passed the Sound at Elsinore. The treaty concluded at Spire, in 1544, with the Emperor Charles V., which has commonly been referred to as the origin, or at least the first recognition, of the Danish claim to the Sound tolls, merely stipulates, in general terms, that the merchants of the Low Countries frequenting the ports of Denmark should pay the same duties as formerly.

(*l*) [Art. ii. of Convention of 13th March, 1871. Hertslet's Map of Europe by Treaty, vol. iii. p. 1921.

The treaty concluded at Christianople, in 1645, between Denmark and the United provinces of the Netherlands, is the earliest convention with any foreign power by which the amount of duties to be levied on the passage of the Sound and Belts was definitely ascertained. A tariff of specific duties on certain articles therein enumerated was annexed to this treaty, and it was stipulated that "goods not mentioned in the list should pay, according to mercantile usage, and what has been practised from ancient times."

A treaty was concluded between the two countries at Copenhagen, in 1701, by which the obscurity in that of Christianople as to the non-specified articles, was meant to be cleared up. By the third article of the new treaty it was declared, that as to the goods not specified in the former treaty, "the Sound duties are to be paid *according to their value;* that is, they are to be valued *according to the place from whence they come*, and one per centum of their value to be paid.

These two treaties of 1645 and 1701, are constantly referred to in all subsequent treaties, as furnishing the standard by which the rates of these duties are to be measured as to *privileged* nations. Those *not privileged*, pay according to a more ancient tariff for the specified articles, and one and a quarter per centum on unspecified articles (*m*).

§ 184. Convention of 1841.

By the arrangement concluded at London and Elsinore, in 1841, between Denmark and Great Britain, the tariff of duties levied on the passage of the Sound and Belts was revised, the duties on non-enumerated articles were made specific, and others reduced in amount, whilst some of the abuses which had crept into the manner of levying the duties in general were corrected. The benefit of this arrangement, which is to subsist for the term of ten years, has been extended to all other nations *privileged* by treaty (*n*).

§ 184a. Abolition of the Sound Dues.

The rights relating to the navigation of these Straits have now been permanently settled. In 1857, a treaty was entered into by Denmark with Great Britain, Austria, Belgium, France, Hanover, Mecklenburg-Schwerin, Oldenburg, the Netherlands, Prussia, Russia, Sweden and

(*m*) Schlegel, Staats-Recht des Königreich Dänemark, 1 Th. kap. 7, §§ 27—29. Wheaton, Hist. Law of Nations, pp. 158—161.

(*n*) Scherer, der Sundzoll, seine Geschichte, sein jetziger Bestand und seine Staatsrechtlich—politische Losung, Beilage Nr. 8—9.

Norway, and the Hanse Towns, by which the King of Denmark agreed (Article I) not to levy any dues or charges upon any ships belonging to any of the contracting States that passed through the Belts or the Sound, "whether they simply traverse Danish waters, or whether they may be obliged by casualties, or by commercial operations, to anchor or lie to therein. No vessel whatever shall henceforward be subjected under any pretext, to any detention or impediment whatever, in the passage of the Sound or of the Belts; but His Majesty the King of Denmark expressly reserves to himself the right of regulating by special arrangements, not involving visit or detention, the treatment in regard to duties and customs, of vessels belonging to powers which are not parties to the present treaty." By Article II. Denmark was to preserve and maintain all existing lighthouses, buoys, &c., and to change or set up such new ones as might become necessary. Pilotage was to be optional, and pilotage charges the same as for Danish vessels. A fixed rate of transit duties on goods was to be established, not exceeding 16 skillings Danish per 500 lbs. Danish. As compensation, the contracting parties engaged, by Article IV., to pay a total sum of 30,476,325 rigs-dollars to Denmark, the sum being assessed in certain proportions among the contracting parties, each party being responsible only for the share placed to its own charge. Separate treaties to the same effect were signed by Denmark with the United States and with Sardinia in 1857, with Portugal and the Two Sicilies in 1858, with Turkey in 1859, and with Spain in 1860 (*o*).

§ 185. *Qu.* Whether the Baltic Sea is *mare clausum?*

The Baltic Sea is considered by the maritime powers bordering on its coasts as *mare clausum* against the exercise of hostilities upon its waters by other States, whilst the Baltic powers are at peace. This principle was proclaimed in the treaties of armed neutrality in 1780 and 1800, and by the treaty of 1794, between Denmark and Sweden, guaranteeing the tranquillity of that sea. In the Russian declaration of war against Great Britain of 1807, the inviolability of that sea and the reciprocal guarantees of the powers that border upon it (guarantees said to have been contracted with the knowledge of the British government) were stated as aggravations of the British proceedings in entering the Sound and attacking the Danish capital in that year. In the British answer to this declaration it was denied that Great Britain had at any time acquiesced in the principles upon which the inviolability of the Baltic is maintained; however she might, at particular periods, have forborne, for special reasons influencing her conduct at the time, to act in contradiction to

(*o*) [See Hertslet, Map of Europe by Treaty, vol. ii. p. 1301. State Papers, vol. xlvii. p. 24].

them. Such forbearance never could have applied but to a state of peace and real neutrality in the north; and she could not be expected to recur to it after France had been suffered, by the conquest of Prussia, to establish herself in full sovereignty along the whole coast, from Dantzic to Lubeck (*p*).

§ 186. Controversy respecting the dominion of the seas.

The controversy, how far the open sea or main ocean, beyond the immediate vicinity of the coasts, may be appropriated by one nation to the exclusion of others, which once exercised the pens of the ablest and most learned European jurists, can hardly be considered open at this day. Grotius, in his treatise on the Law of Peace and War, hardly admits more than the possibility of appropriating the waters immediately contiguous, though he adduces a number of quotations from ancient authors, showing that a broader pretension has been sometimes sanctioned by usage and opinion. But he never intimates that anything more than a limited portion could be thus claimed; and he uniformly speaks of "*pars*," or "*portus maris*," always confining his view to the effect of the neighbouring land in giving a jurisdiction and property of this sort (*q*). He had previously taken the lead in maintaining the common right of mankind to the free navigation, commerce, and fisheries of the Atlantic and Pacific Oceans, against the exclusive claims of Spain and Portugal, founded on the right of previous discovery, confirmed by possession and the papal grants. The treatise De Mare Libero was published in 1609. The claim of sovereignty asserted by the kings of England over the British seas was supported by Albericus Gentilis in his Advocatio Hispanica in 1613. In 1635, Selden published his Mare Clausum, in which the general principles maintained by Grotius are called in question, and the claim of England more fully vindicated than by Gentilis. The first book of Selden's celebrated treatise is devoted to the proposition that the sea may be made property, which he attempts to show, not by reasoning, but by collecting a multitude of quotations from ancient authors, in the style of Grotius, but with much less selection. He nowhere grapples with the arguments by which such a vague and extensive dominion is shown to be repugnant to the law of

(*p*) Annual Register, vol. xlix. State Papers, p. 773.
(*q*) De Jur. Bel. ac Pac. lib. ii. cap. 3, §§ 8—13.

nations. And in the second part, which indeed is the main object of his work, he has recourse only to proofs of usage and of positive compact, in order to show that Great Britain is entitled to the sovereignty of what are called the Narrow Seas. Father Paul Sarpi, the celebrated historian of the Council of Trent, also wrote a vindication of the claim of the Republic of Venice to the sovereignty of the Adriatic (*r*). Bynkershoek examined the general question, in the earliest of his published works, with the vigour and acumen which distinguish all his writings. He admits that certain portions of the sea may be susceptible of exclusive dominion, though he denies the claim of the English crown to the British seas on the ground of the want of uninterrupted possession. He asserts that there was no instance, at the time when he wrote, in which the sea was subject to any particular sovereign, where the surrounding territory did not also belong to him (*s*). Puffendorf lays it down, that in a narrow sea the dominion belongs to the sovereigns of the surrounding land, and is distributed, where there are several such sovereigns, according to the rules applicable to neighbouring proprietors on a lake or river, supposing no compact has been made, "as is pretended," he says, "by Great Britain;" but he expresses himself with a sort of indignation at the idea that the main ocean can ever be appropriated (*t*). The authority of Vattel would be full and explicit to the same purpose, were it not weakened by the concession, that though the exclusive right of navigation or fishery in the sea cannot be claimed by one nation on the ground of immemorial use, nor lost to others by non-user, on the principle of prescription, yet it may be thus

(*r*) Paolo Sarpi, Del Dominio del Mare Adriatico e sui Reggioni per o *Jus Belli* della Serenissima Rep. di Venezia, *Venet.* 1676, 12°.

(*s*) De Dominio Maris, Opera Minora, Dissert. V., first published in 1702.

"Nihil addo, quàm sententiæ nostræ hanc conjectionem: Oceanus, quà patet, totus imperio subjici non potest; pars potest, possunt et maria mediterranea, quotquot sunt, omnia. Nullum tamen mare mediterraneum, neque ulla pars Oceani ditione alicujus Principis tenetur, nisi quà in continentis sit imperio. Pronunciamus MARE LIBERUM, quod non possidetur vel universum possideri nequit, CLAUSUM, quod post justam occupationem navi unâ pluribusve olim possessum fuit, et, si est in fatis, possidebitur posthac, nullum equidem nunc agnoscimus subditum, cùm non sufficiat id affectasse, quin vel aliquando occupasse et possedisse, nisi etiamnum duret possessio, quæ gentium hodie est nullibi; ita libertatem et imperium, quæ haud facile miscentur, unâ sede locamus." Ib. cap. vii. ad finem.

(*t*) De Jure Naturæ et Gentium, lib. iv. cap. 5, § 7.

established where the non-user assumes the nature of a consent or tacit agreement, and thus becomes a title in favour of one nation against another (*u*).

§ 187. Review of the controversy.

On reviewing this celebrated controversy it may be affirmed, that if those public jurists who have asserted the exclusive right of property in any particular nation over portions of the sea, have failed in assigning sufficient grounds for such a claim, so also the arguments alleged by their opponents for the contrary opinion must often appear vague, futile, and inconclusive. There are only two decisive reasons applicable to the question. The first is physical and material, which alone would be sufficient; but when coupled with the second reason, which is purely moral, will be found conclusive of the whole controversy.

I. Those things which are originally the common property of all mankind, can only become the exclusive property of a particular individual or society of men, by means of possession. In order to establish the claim of a particular nation to a right of property in the sea, that nation must obtain and keep possession of it, which is impossible.

II. In the second place, the sea is an element which belongs equally to all men like the air. No nation, then, has the right to appropriate it, even though it might be physically possible to do so.

It is thus demonstrated, that the sea cannot become the exclusive property of any nation. And, consequently, the use of the sea, for these purposes, remains open and common to all mankind (*x*).

We have already seen that, by the generally approved usage of nations, which forms the basis of international law, the maritime territory of every State extends:

1st. To the ports, harbours, bays, mouths of rivers, and adjacent parts of the sea inclosed by headlands, belonging to the same State.

2ndly. To the distance of a marine league, or as far as a

(*u*) Droit des Gens, liv. i. ch. 23, §§ 279—286. As to the maritime police which may be exercised by any particular nation, on the high seas, for the punishment of offences committed on board its own vessels, or the suppression of piracy and the African slave trade, *vide supra*, pt. ii. ch. ii. §§ 106, 122.

(*x*) Ortolan, Règles Internationales et Diplomatie de la Mer. tom. i. pp. 120—126.

cannon-shot will reach from the shore, along all the coasts of the State.

3rdly. To the straits and sounds, bounded on both sides of the territory of the same State, so narrow as to be commanded by cannon-shot from both shores, and communicating from one sea to another (*y*).

§ 188. Ports, mouths of rivers, &c.

The reasons which forbid the assertion of an exclusive proprietary right to the sea in general, will be found inapplicable to the particular portions of that element included in the above designations.

1. Thus, in respect to those portions of the sea which form the ports, harbours, bays, and mouths of rivers of any State where the tide ebbs and flows, its exclusive right of property, as well as sovereignty, in these waters, may well be maintained, consistently with both the reasons above mentioned, as applicable to the sea in general. The State possessing the adjacent territory, by which these waters are partially surrounded and inclosed, has that physical power of constantly acting upon them, and, at the same time, of excluding, at its pleasure, the action of any other State or person, which, as we have already seen, constitutes possession. These waters cannot be considered as having been intended by the Creator for the common use of all mankind, any more than the adjacent land, which has already been appropriated by a particular people. Neither the material nor the moral obstacle, to the exercise of the exclusive rights of property and dominion, exists in this case. Consequently, the State, within whose territorial limits these waters are included, has the right of excluding every other nation from their use. The exercise of this right may be modified by compact, express or implied; but its existence is founded upon the mutual independence of nations, which entitles every State to judge for itself as to the manner in which the right is to be exercised, subject to the equal reciprocal rights of all other States to establish similar regulations, in respect to their own waters (*z*).

§ 189. The marine league.

2. It may, perhaps, be thought that these considerations do not apply, with the same force, to those portions of the sea

(*y*) *Vide supra*, § 174.
(*z*) *Vide supra*, pt. ii. ch. 2, §§ 177—181.

which wash the coasts of any particular State, within the distance of a marine league, or as far as a cannon-shot will reach from the shore. The physical power of exercising an exclusive property and jurisdiction, and of excluding the action of other nations within these limits, exists to a certain degree; but the moral power may, perhaps, seem to extend no further than to exclude the action of other nations to the injury of the State by which this right is claimed. It is upon this ground that is founded the acknowledged immunity of a neutral State from the exercise of acts of hostility, by one belligerent power against another, within those limits. This claim has, however, been sometimes extended to exclude other nations from the innocent use of the waters washing the shores of a particular State, in peace and in war; as, for example, for the purpose of participating in the fishery, which is generally appropriated to the subjects of the State within that distance of the coasts. This exclusive claim is sanctioned both by usage and convention, and must be considered as forming a part of the positive law of nations (*a*).

§ 190. Straits and sounds.

3. As to straits and sounds, bounded on both sides by the territory of the same State, so narrow as to be commanded by cannon-shot from both shores, and communicating from one sea to another, we have already seen that the territorial sovereignty may be limited, by the right of other nations to navigate the seas thus connected. The physical power which the State, bordering on both sides the sound or strait, has of appropriating its waters, and of excluding other nations from their use, is here encountered by the moral obstacle arising from the right of other nations to communicate with each other. If the Straits of Gibraltar, for example, were bounded on both sides by the possessions of the same nation, and if they were sufficiently narrow to be commanded by cannon-shot from both shores, this passage would not be the less freely open to all nations; since the navigation, both of the Atlantic Ocean and the Mediterranean Sea, is free to all. Thus it has already been stated that the navigation of the

(*a*) Martens, Précis du Droit des Gens Moderne de l'Europe, § 153. "Mais si, loin de s'en emparer, il a une fois reconnu le droit commun des autres peuples d'y venir pêcher, il ne peut plus les en exclure; il a laissé cette pêche dans sa communion primitive, au moins à l'égard de ceux qui sont en possession d'en profiter." Vattel, Droit des Gens, liv. i. c. 23, § 287.

Dardanelles and the Bosphorus, by which the Mediterranean and Black Seas are connected together, is free to all nations, subject to those regulations which are indispensably necessary for the security of the Ottoman Empire. In the negotiations which preceded the signature of the treaty of intervention, of the 15th of July, 1840, it was proposed, on the part of Russia, that an article should be inserted in the treaty, recognizing the permanent rule of the Ottoman Empire, that, whilst that empire is at peace, the Straits, both of the Bosphorus and the Dardanelles, are considered as shut against the ships of war of all nations. To this proposition it was replied, on the part of the British government, that its opinion respecting the navigation of these Straits by the ships of war of foreign nations rested upon a general and fundamental principle of international law. Every State is considered as having territorial jurisdiction over the sea which washes its shores, as far as three miles from low-water mark; and, consequently, any strait which is bounded on both sides by the territory of the same sovereign, and which is not more than six miles wide, lies within the territorial jurisdiction of that sovereign. But the Bosphorus and Dardanelles are bounded on both sides by the territory of the. Sultan, and are in most parts less than six miles wide; consequently his territorial jurisdiction extends over both those Straits, and he has a right to exclude all foreign ships of war from those Straits, if he should think proper so to do. By the Treaty of 1809, Great Britain acknowledged this right on the part of the Sultan, and promised to acquiesce in the enforcement of it; and it was but just that Russia should take the same engagement. The British government was of opinion, that the exclusion of all foreign ships of war from the two Straits would be more conducive to the maintenance of peace, than an understanding that the Strait in question should be a general thoroughfare, open, at all times, to ships of war of all countries; but whilst it was willing to acknowledge by treaty, as a general principle and as a standing rule, that the two Straits should be closed for all ships of war, it was of opinion, that if, for a particular emergency, one of those Straits should be open for one party, the other ought, at the same time, to be open for

other parties, in order that there should be the same parity between the condition of the two Straits, when open and shut; and, therefore, the British government would expect that, in that part of the proposed Convention which should allot to each power its appropriate share of the measures of execution, it should be stipulated, that if it should become necessary for a Russian force to enter the Bosphorus, a British force should, at the same time, enter the Dardanelles.

§ 191. The Dardanelles.

It was accordingly declared, in the 4th article of the Convention, that the co-operation destined to place the Straits of the Dardanelles and the Bosphorus and the Ottoman capital under the temporary safeguard of the contracting parties, against all aggression of Mehemet Ali, should be considered only as a measure of exception, adopted at the express request of the Sultan, and solely for his defence, in the single case above mentioned; but it was agreed that such measure should not derogate, in any degree, from the ancient rule of the Ottoman Empire, in virtue of which it had, at all times, been prohibited for ships of war of foreign powers to enter those Straits. And the Sultan, on the one hand, declared that, excepting the contingency above mentioned, it was his firm resolution to maintain, in future, this principle invariably established as the ancient rule of his Empire, and, so long as the Porte should be at peace, to admit no foreign ship of war into these Straits; on the other hand, the four Powers engaged to respect this determination, and to conform to the above-mentioned principle.

This rule, and the engagement to respect it, as we have already seen, were subsequently incorporated into the Treaty of the 13th July, 1841, between the five great European Powers and the Ottoman Porte; and as the right of the private merchant vessels of all nations, in amity with the Porte, to navigate the interior waters of the Empire, which connect the Mediterranean and Black Seas, was recognized by the Treaty of Adrianople, in 1829, between Russia and the Porte; the two principles—the one excluding foreign ships of war, and the other admitting foreign merchant vessels to navigate those waters—may be considered as permanently incorporated into the public law of Europe (*b*).

(*b*) Wheaton, Hist. Law of Nations, pp. 577—583. [See Appendix F.]

§ 192. Rivers forming part of the territory of the State.

The territory of the State includes the lakes, seas, and rivers, entirely inclosed within its limits. The rivers which flow through the territory also form a part of the domain, from their sources to their mouths, or as far as they flow within the territory, including the bays or estuaries formed by their junction with the sea. Where a navigable river forms the boundary of conterminous States, the middle of the channel, or *Thalweg*, is generally taken as the line of separation between the two States, the presumption of law being that the right of navigation is common to both; but this presumption may be destroyed by actual proof of prior occupancy and long undisturbed possession, giving to one of the riparian proprietors the exclusive title to the entire river (*c*).

§ 193. Right of innocent passage on rivers flowing through different States.

Things of which the use is inexhaustible, such as the sea and running water, cannot be so appropriated as to exclude others from using these elements in any manner which does not occasion a loss or inconvenience to the proprietor. This is what is called an *innocent use*. Thus we have seen that the jurisdiction possessed by one nation over sounds, straits, and other arms of the sea, leading through its own territory to that of another, or to other seas common to all nations, does not exclude others from the right of *innocent passage* through these communications. The same principle is applicable to rivers flowing from one State through the territory of another into the sea, or into the territory of a third State. The right of navigating, for commercial purposes, a river which flows through the territories of different States, is common to all the nations inhabiting the different parts of its banks; but this right of innocent passage being what the text-writers call an *imperfect right*, its exercise is necessarily modified by the safety and convenience of the State affected by it, and can only be effectually secured by mutual convention regulating the mode of its exercise (*d*).

§ 194. Incidental right to use

It seems that this right draws after it the incidental right of using all the means which are necessary to the secure en-

(*c*) Vattel, Droit des Gens, liv. i. ch. 22, § 266. Martens, Précis du Droit des Gens Moderne de l'Europe, liv. ii. ch. 1, § 39. Heffter, das Europaische Volkerrecht, §§ 66—77.

(*d*) Grotius, de Jur. Bel. ac Pac. lib. ii. cap. 2, §§ 12—14; cap. 3, §§ 7—12. Vattel, Droit des Gens, liv. ii. ch. 9, §§ 126—130; ch. 10, §§ 132—134. Puffendorf, de Jur. Naturæ et Gentium, lib. iii. cap. 3, §§ 3—6.

joyment of the principal right itself. Thus the Roman law, which considered navigable rivers as public or common property, declared that the right to the use of the shores was incident to that of the water; and that the right to navigate a river involved the right to moor vessels to its banks, to lade and unlade cargoes, &c. The public jurists apply this principle of the Roman civil law to the same case between nations, and infer the right to use the adjacent land for these purposes, as means necessary to the attainment of the end for which the free navigation of the water is permitted (*e*). the banks of the rivers.

The incidental right, like the principal right itself, is imperfect in its nature, and the mutual convenience of both parties must be consulted in its exercise. § 195. These rights are *imperfect.*

Those who are interested in the enjoyment of these rights may renounce them entirely, or consent to modify them in such manner as mutual convenience and policy may dictate. A remarkable instance of such a renunciation is found in the Treaty of Westphalia, 1648, confirmed by subsequent treaties, by which the navigation of the river Scheldt was closed to the Belgic provinces, in favour of the Dutch. The forcible opening of this navigation by the French on the occupation of Belgium by the arms of the French Republic, in 1792, in violation of these treaties, was one of the principal ostensible causes of the war between France on one side, and Great Britain and Holland on the other. By the Treaties of Vienna, the Belgic provinces were united to Holland under the same sovereign, and the navigation of the Scheldt was placed on the same footing of freedom with that of the Rhine and other great European rivers. And by the Treaty of 1831, for the separation of Holland from Belgium, the free navigation of the Scheldt was, in like manner, secured, subject to certain duties, to be collected by the Dutch government (*f*). § 196. Modification of these rights by compact.

On the 16th July, 1863, a treaty was entered into between Belgium and most of the European Powers, by which Belgium agreed to suppress the tolls on the Scheldt. Holland had renounced her claims to the tolls on the 12th of May of the same year, in consideration of an indemnity § 196a. Redemption of the Scheldt tolls.

(*e*) Grotius, de Jur. Bel. ac Pac. lib. ii. cap. 2, § 15. Puffendorf, de Jur. Naturæ et Gentium, lib. iii. cap. 3, § 8. Vattel, Droit des Gens, liv. ii. ch. 9, § 129.

(*f*) Wheaton, Hist. Law of Nations, pp. 282—284, 552.

paid to her by Belgium (*g*). The suppression of the tolls was to apply to every flag, and they were never to be re-established. Belgium also agreed to abolish tonnage dues in her ports, and to reduce the pilotage rates previously charged; but this was only to apply to countries which were parties to the treaty (*h*). As a compensation, the signatory powers agreed to indemnify Belgium against the claims she had become liable to, under the treaty with Holland, and to pay her a total sum, assessed in certain proportions among the contracting parties (*i*).

§ 197. Treaties of Vienna respecting the great European rivers.

By the Treaty of Vienna in 1815, the commercial navigation of rivers, which separate different States, or flow through their respective territories, was declared to be entirely free in their whole course, from the point where each river becomes navigable to its mouth; provided that the regulations relating to the police of the navigation should be observed, which regulations were to be uniform, and as favourable as possible to the commerce of all nations (*k*).

By the *Annexe* xvi. to the final act of the Congress of Vienna, the free navigation of the Rhine is confirmed "in its whole course, from the point where it becomes navigable to the sea, ascending or descending;" and detailed regulations are provided respecting the navigation of that river, and the Neckar, the Mayn, the Moselle, the Meuse, and the Scheldt, which are declared in like manner to be free from the point where each of these rivers becomes navigable to its mouth. Similar regulations respecting the free navigation of the Elbe were established among the powers interested in the commerce of that river, by an act signed at Dresden the 12th December, 1821. And the stipulations between the different powers interested in the free navigation of the Vistula and other rivers of ancient Poland contained in the treaty of the 3rd May, 1815, between Austria and Russia, and of the same date between Russia and Prussia, to which last Austria subsequently acceded, are confirmed by the final act of the Congress of Vienna. The same treaty also extends the general principles adopted by the congress relating to the navigation of rivers to that of the Po (*l*).

(*g*) [Hertslet, Map of Europe by Treaty, vol. ii. p. 1532].
(*h*) [The United States were not a party].
(*i*) [Hertslet, Map of Europe by Treaty, vol. ii. p. 1550].
(*k*) Wheaton, Hist. Law of Nations, pp. 498—501.
(*l*) Mayer, Corpus Juris Germanici, tom. ii. pp. 224—239, 298. Acte Final, art. 14, 118, 96.

§ 197a. Navigation of the Danube.

These principles were applied to the Danube by the Treaty of Paris, 1856 (*m*). It was then declared that "The navigation of the Danube cannot be subjected to any impediment or charge not expressly provided for by the stipulations contained in the following articles; in consequence there shall not be levied any toll founded solely upon the fact of the navigation of the river, nor any duty upon the goods which may be on board of vessels. The regulations of police and of quarantine to be established for the safety of the States separated or traversed by that river, shall be so framed as to facilitate, as much as possible, the passage of vessels. With the exception of such regulations, no obstacle whatever shall be opposed to free navigation." A European commission was then appointed to manage the navigation of the river, and to carry out the works necessary for this purpose (*n*).

§ 197b. Neutrality of the River and the Commission.

In 1865, a public Act was promulgated by the parties to the Treaty of Paris, by which all the works of the Danube Commission, together with its members and servants, were declared neutral in case of war. This principle was re-affirmed in the Treaty of 1871; but the right of Turkey, as territorial power, to send vessels of war into the river was maintained (*o*). When war broke out between Russia and Turkey in 1877, some stoppage of the navigation became inevitable, as the lower part of the river was at first the actual seat of war. Both Austria and England addressed notes on the subject to the Governments of Russia and Turkey. It was admitted that the incidents of war might cause temporary obstacles to the navigation of the Danube; but a demand was made that this exceptional situation should not be invoked as a precedent to the prejudice of the liberty of navigation, and that the measures restricting this liberty, which might become indispensable, should be regulated on international principles, and should not overstep the limits traced by the most imperious necessity. As soon as the circumstances of the war permitted, the belligerents were immediately to restore the freedom of navigation (*p*). To this both parties replied, that they would confine their restrictions on the freedom of neutral commerce to the narrowest limits that the necessities of the war would admit, and that these restrictions would be removed as soon as possible (*q*). Throughout the discussion it was admitted that the existing international arrangements did not imply the absolute neutrality of the river way. The works of the Danube Commission could alone claim this exemption from the effects of war (*r*).

§ 198. Navigation of the Rhine.

The interpretation of the above stipulations respecting the free navigation of the Rhine, gave rise to a controversy be-

(*m*) [Art. xv. Hertslet, Map of Europe by Treaty, vol. ii. p. 1257].
(*n*) [Art. xvii.].
(*o*) [Parl. Papers, Turkey (No. 29), 1878, p. 25. Hertslet, Map, vol. iii., p. 1922].
(*p*) [Parl. Papers, Turkey (No. 25), 1877, pp. 236, 294].
(*q*) [Ibid. Turkey (No. 26), 1877, pp. 26, 113].
(*r*) [As to Danube treaties, see Parl. Papers, Turkey (No. 29), 1878].

tween the kingdom of the Netherlands and the other States interested in the commerce of that river. The Dutch government claimed the exclusive right of regulating and imposing duties upon the trade, within its own territory, at the places where the different branches into which the Rhine divides itself fall into the sea. The expression in the Treaties of Paris and Vienna "*jusqu'à la mer*," to the sea, was said to be different in its import from the term "*dans la mer*," into the sea; and, besides, it was added, if the upper States insist so strictly upon the terms of the treaties, they must be contented with the course of the proper Rhine itself. The mass of waters brought down by that river, dividing itself a short distance above Nimeguen, is carried to the sea through three principal channels, the Waal, the Leck, and the Yssel; the first descending by Gorcum, where it changes its name for that of the Meuse; the second approaching the sea at Rotterdam; and the third, taking a northerly course by Zutphen and Deventer, empties itself into Zuyderzee. None of these channels, however, is called the Rhine; that name is preserved to a small stream which leaves the Leck at Wyck, takes its course by the learned retreats of Utrecht and Leyden, gradually dispersing and losing its waters among the sandy downs at Kulwyck. The proper Rhine being thus useless for the purposes of navigation, the Leck was substituted for it by common consent of the powers interested in the question; and the government of the Netherlands afterwards consented that the Waal, as being better adapted to the purposes of navigation, should be substituted for the Leck. But it was insisted by that government that the Waal terminates at Gorcum, to which the tide ascends, and where, consequently, the Rhine terminates; all that remains of that branch of the river from Gorcum to Helvoetsluys and the mouth of the Meuse is an arm of the sea, inclosed within the territory of the kingdom, and consequently subject to any regulations which its government may think fit to establish.

On the other side, it was contended by the powers interested in the navigation of the river, that the stipulations in the Treaty of Paris, in 1814, by which the sovereignty of the House of Orange over Holland was revived, with an accession of territory, and the navigation of the Rhine was, at the

same time, declared to be free "from the point where it becomes navigable to the sea," were inseparably connected in the intentions of the allied powers who were parties to the treaty. The intentions thus disclosed were afterwards carried into effect by the Congress of Vienna, which determined the union of Belgium to Holland, and confirmed the freedom of the navigation of the Rhine, as a condition annexed to this augmentation of territory which had been accepted by the government of the Netherlands. The right to the free navigation of the river, it was said, draws after it, by necessary implication, the innocent use of the different waters which unite it with the sea; and the expression "to the sea" was, in this respect, equivalent to the term "into the sea," since the pretension of the Netherlands to levy unlimited duties upon its principal passage into the sea would render wholly useless to other States the privilege of navigating the river within the Dutch territory (*s*).

§ 199. The Rhine.

After a long and tedious negotiation, this question was finally settled by the convention concluded at Mayence, the 31st of March, 1831, between all the riparian States of the Rhine, by which the navigation of the river was declared free from the point where it becomes navigable into the sea, (*bis in die See*,) including its two principal outlets or mouths in the kingdom of the Netherlands, the Leck and the Waal, passing by Rotterdam and Briel through the first-named watercourse, and by Dordrecht and Helvoetsluys through the latter, with the use of the artificial communication by the canal of Voorne with Helvoetsluys. By the terms of this treaty the government of the Netherlands stipulates, in case the passages by the main sea by Briel or Helvoetsluys should at any time become innavigable, through natural or artificial causes, to indicate other watercourses for the navigation and commerce of the riparian States, equal in convenience to those which may be open to the navigation and commerce of its own subjects. The convention also provides minute regulations of police and fixed toll-duties on vessels and merchandise passing through the Netherlands territory to or from the sea, and also by the different ports of the upper riparian States on the Rhine (*t*).

(*s*) Annual Register for 1826, vol. lxviii. pp. 259—363.
(*t*) Martens, Nouveau Recueil, tom. ix. p. 252.

§ 200. Navigation of the Mississippi.

By the Treaty of Peace concluded at Paris in 1763, between France, Spain, and Great Britain, the province of Canada was ceded to Great Britain by France, and that of Florida to the same power by Spain, and the boundary between the French and British possessions in North America was ascertained by a line drawn through the middle of the river Mississippi from its source to the Iberville, and from thence through the latter river and the lakes of Maurepas and Pontchartrain to the sea. The right of navigating the Mississippi was at the same time secured to the subjects of Great Britain from its source to the sea, and the passages in and out of its mouth, without being stopped, or visited, or subjected to the payment of any duty whatsoever. The province of Louisiana was soon afterwards ceded by France to Spain; and by the Treaty of Paris, 1783, Florida was retroceded to Spain by Great Britain. The independence of the United States was acknowledged, and the right of navigating the Mississippi was secured to the citizens of the United States and the subjects of Great Britain by the separate treaty between these powers. But Spain having become thus possessed of both banks of the Mississippi at its mouth, and a considerable distance above its mouth, claimed its exclusive navigation below the point where the southern boundary of the United States struck the river. This claim was resisted, and the right to participate in the navigation of the river from its source to the sea was insisted on by the United States, under the treaties of 1763 and 1783, as well as by the law of nature and nations. The dispute was terminated by the Treaty of San Lorenzo el Real, in 1795, by the 4th article of which his Catholic Majesty agreed that the navigation of the Mississippi, in its whole breadth, from its source to the ocean, should be free to the citizens of the United States: and by the 22nd article, they were permitted to deposit their goods at the port of New Orleans, and to export them from thence, without paying any other duty than the hire of the warehouses. The subsequent acquisition of Louisiana and Florida by the United States having included within their territory the whole river from its source to the Gulf of Mexico, and the stipulation in the treaty of 1783, securing to British subjects a right to participate in its navigation, not having been renewed by the Treaty of Ghent in

1814, the right of navigating the Mississippi is now vested exclusively in the United States.

§ 201. Claim of the United States.

The right of the United States to participate with Spain in the navigation of the river Mississippi, was rested by the American government on the sentiment written in deep characters on the heart of man, that the ocean is free to all men, and its rivers to all their inhabitants. This natural right was found to be universally acknowledged and protected in all tracts of country, united under the same political society, by laying the navigable rivers open to all their inhabitants. When these rivers enter the limits of another society, if the right of the upper inhabitants to descend the stream was in any case obstructed, it was an act of force by a stronger society against a weaker, condemned by the judgment of mankind. The, then, recent case of the attempt of the Emperor Joseph II. to open the navigation of the Scheldt from Antwerp to the sea, was considered as a striking proof of the general union of sentiment on this point, as it was believed that Amsterdam had scarcely an advocate out of Holland, and even there her pretensions were advocated on the ground of treaties, and not of natural right. This sentiment of right in favour of the upper inhabitants must become stronger in the proportion which their extent of country bears to the lower. The United States held 600,000 square miles of inhabitable territory on the Mississippi and its branches, and this river, with its branches, afforded many thousands of miles of navigable waters penetrating this territory in all its parts. The inhabitable territory of Spain below their boundary and bordering on the river, which alone could pretend any fear of being incommoded by their use of the river, was not the thousandth part of that extent. This vast portion of the territory of the United States had no other outlet for its productions, and these productions were of the bulkiest kind. And, in truth, their passage down the river might not only be innocent, as to the Spanish subjects on the river, but would not fail to enrich them far beyond their actual condition. The real interests, then, of the inhabitants, upper and lower, concurred in fact with their respective rights.

§ 202. Legal view of the claim.

If the appeal was to the law of nature and nations, as expressed by writers on the subject, it was agreed by them, that

even if the river, where it passes between Florida and Louisiana, were the exclusive right of Spain, still an innocent passage along it was a natural right in those inhabiting its borders above. It would, indeed, be what those writers call an *imperfect* right, because the modification of its exercise depends, in a considerable degree, on the conveniency of the nation through which they were to pass. But it was still a *right*, as real as any other right, however well defined: and were it to be refused, or to be so shackled by regulations not necessary for the peace or safety of the inhabitants, as to render its use impracticable to us, it would then be an injury, of which we should be entitled to demand redress. The right of the upper inhabitants to use this navigation was the counterpart to that of those possessing the shores below, and founded in the same natural relations with the soil and water. And the line at which their respective rights met was to be advanced or withdrawn, so as to equalize the inconveniences resulting to each party from the exercise of the right by the other. This estimate was to be fairly made with a mutual disposition to make equal sacrifices, and the numbers on each side ought to have their due weight in the estimate. Spain held so very small a tract of habitable land on either side below our boundary, that it might in fact be considered as a strait in the sea; for though it was eighty leagues from our southern boundary to the mouth of the river, yet it was only here and there in spots and slips that the land rises above the level of the water in times of inundation. There were then, and ever must be, so few inhabitants on her part of the river, that the freest use of its navigation might be admitted to us without their annoyance (*u*).

It was essential to the interests of both parties that the navigation of the river should be free to both, on the footing on which it was defined by the Treaty of Paris, viz., through its whole breadth. The channel of the Mississippi was remarkably winding, crossing and recrossing perpetually from one side to the other of the general bed of the river. Within the elbows thus made by the channel, there was generally an

(*u*) The authorities referred to on this head were the following: Grotius, de Jur. Bel. ac Pac. lib. ii. cap. 2, §§ 11—13; c. 3, §§ 7—12. Puffendorf, lib. iii. cap. 3, §§ 3—6. Wolff's Inst. §§ 310—312. Vattel, liv. i. 292; liv. i. §§ 123—139.

eddy setting upwards, and it was by taking advantage of these eddies, and constantly crossing from one to another of them, that boats were enabled to ascend the river. Without this right the navigation of the whole river would be impracticable both to the Americans and Spaniards.

It was a principle that the right to a thing gives a right to the means without which it could not be used, that is to say, that the means follow the end. Thus a right to navigate a river draws to it a right to moor vessels to its shores, to land on them in cases of distress, or for other necessary purposes, &c. This principle was founded in natural reason, was evidenced by the common sense of mankind, and declared by the writers before quoted.

The Roman law, which, like other municipal laws, placed the navigation of their rivers on the footing of nature, as to their own citizens, by declaring them public, declared also that the right to the use of the shores was incident to that of the water (*x*). The laws of every country probably did the same. This must have been so understood between France and Great Britain at the Treaty of Paris, where a right was ceded to British subjects to navigate the whole river, and expressly that part between the island of New Orleans and the western bank, without stipulating a word about the use of the shores, though both of them belonged then to France, and were to belong immediately to Spain. Had not the use of the shores been considered as incident to that of the water, it would have been expressly stipulated, since its necessity was too obvious to have escaped either party. Accordingly all British subjects used the shores habitually for the purposes necessary to the navigation of the river; and when a Spanish governor undertook at one time to forbid this, and even cut loose the vessels fastened to the shores, a British vessel went immediately, moored itself opposite the town of New Orleans, and set out guards with orders to fire on such as might attempt to disturb her moorings. The governor acquiesced, the right was constantly exercised afterwards, and no interruption ever offered.

This incidental right extends even beyond the shores, when circumstances render it necessary to the exercise of the

(*x*) Inst. liv. ii. t. 1, §§ 1—5.

principal right; as in the case of a vessel damaged, where the mere shore could not be a safe deposit for her cargo till she could be repaired, she may remove into safe ground off the river. The Roman law was here quoted too, because it gave a good idea both of the extent and the limitations of this right (*y*).

§ 203. Navigation of the St. Lawrence.

The relative position of the United States and Great Britain in respect to the navigation of the great northern lakes and the river St. Lawrence, appears to be similar to that of the United States and Spain, previously to the cession of Louisiana and Florida, in respect to the Mississippi; the United States being in possession of the southern shores of the lakes and the river St. Lawrence to the point where their northern boundary line strikes the river, and Great Britain, of the northern shores of the lakes and the river in its whole extent to the sea, as well as of the southern banks of the river, from the latitude 45° north to its mouth.

The claim of the people of the United States, of a right to navigate the St. Lawrence to and from the sea, was, in 1826, the subject of discussion between the American and British governments.

§ 204. The St. Lawrence.

On the part of the United States government, this right is rested on the same grounds of natural right and obvious necessity which had formerly been urged in respect to the river Mississippi. The dispute between different European powers respecting the navigation of the Scheldt, in 1784, was also referred to in the correspondence on this subject, and the case of that river was distinguished from that of the St. Lawrence by its peculiar circumstances. Among others, it is known to have been alleged by the Dutch, that the whole course of the two branches of this river which passed within the dominions of Holland was entirely *artificial;* that it owed its existence to the skill and labour of Dutchmen; that its banks had been erected and maintained by them at a great expense. Hence, probably, the motive for that stipulation in the Treaty of Westphalia, that the lower Scheldt, with the

(*y*) Mr. Jefferson's Instructions to U. S. Ministers in Spain, March 18 1792. Waite's State Papers, vol. x. pp. 135—140.

canals of Sas and Swin, and other mouths of the sea adjoining them, should be kept closed on the side belonging to Holland. But the case of the St. Lawrence was totally different, and the principles on which its free navigation was maintained by the United States had recently received an unequivocal confirmation in the solemn act of the principal States of Europe. In the treaties concluded at the Congress of Vienna, it had been stipulated that the navigation of the Rhine, the Neckar, the Mayn, the Moselle, the Maese, and the Scheldt, should be free to all nations. These stipulations, to which Great Britain was a party, might be considered as an indication of the present judgment of Europe upon the general question. The importance of the present claim might be estimated by the fact, that the inhabitants of at least eight States of the American Union, besides the territory of Michigan, had an immediate interest in it, besides the prospective interests of other parts connected with this river and the inland seas through which it communicates with the ocean. The right of this great and growing population to the use of this its only natural outlet to the ocean, was supported by the same principles and authorities which had been urged by Mr. Jefferson in the negotiation with Spain respecting the navigation of the river Mississippi. The present claim was also fortified by the consideration that this navigation was, before the war of the American Revolution, the common property of all the British subjects inhabiting this continent, having been acquired from France by the united exertions of the mother country and the colonies, in the war of 1756. The claim of the United States to the free navigation of the St. Lawrence was of the same nature with that of Great Britain to the navigation of the Mississippi, as recognized by the 7th article of the Treaty of Paris, 1763, when the mouth and lower shores of that river were held by another power. The claim, whilst necessary to the United States, was not injurious to Great Britain, nor could it violate any of her just rights (*z*).

On the part of the British government, the claim was con-

(*z*) American Paper on the Navigation of the St. Lawrence. Congress Documents, Session 1827—1828, No. 43, p. 31.

sidered as involving the question whether a *perfect* right to the free navigation of the river St. Lawrence could be maintained according to the principles and practice of the law of nations.

The liberty of passage to be enjoyed by one nation through the dominions of another was treated by the most eminent writers on public law as a qualified, occasional exception to the paramount rights of property. They made no distinction between the right of passage by a river, flowing from the possessions of one nation through those of another, to the ocean, and the same right to be enjoyed by means of any highway, whether of land or water, generally accessible to the inhabitants of the earth. The right of passage, then, must hold good for other purposes, besides those of trade,—for objects of war as well as for objects of peace,—for all nations, no less than for any nation in particular, and be attached to artificial as well as to natural highways. The principle could not, therefore, be insisted on by the American government, unless it was prepared to apply the same principle by reciprocity, in favour of British subjects, to the navigation of the Mississippi and the Hudson, access to which from Canada might be obtained by a few miles of land-carriage, or by the artificial communications created by the canals of New York and Ohio. Hence the necessity which has been felt by the writers on public law, of controlling the operation of a principle so extensive and dangerous, by restricting the right of transit to purposes of *innocent* utility, to be exclusively determined by the local sovereign. Hence the right in question is termed by them an *imperfect* right. But there was nothing in these writers, or in the stipulations of the Treaties of Vienna, respecting the navigation of the great rivers of Germany, to countenance the American doctrine of an absolute, natural right. These stipulations were the result of mutual consent, founded on considerations of mutual interest growing out of the relative situation of the different States concerned in this navigation. The same observation would apply to the various conventional regulations which had been, at different periods, applied to the navigation of the river Mississippi. As to any supposed right derived from the simultaneous acquisition of the St. Lawrence by the British and American

people, it could not be allowed to have survived the treaty of 1783, by which the independence of the United States was acknowledged, and a partition of the British dominions in North America was made between the new government and that of the mother country (*a*).

§ 205. The St. Lawrence.

To this argument it was replied, on the part of the United States, that, if the St. Lawrence were regarded as a *strait* connecting navigable seas, as it ought properly to be, there would be less controversy. The principle on which the right to navigate straits depends, is, that they are accessorial to those seas which they unite, and the right of navigating which is not exclusive, but common to all nations; the right to navigate the seas drawing after it that of passing the straits. The United States and Great Britain have between them the exclusive right of navigating the lakes. The St. Lawrence connects them with the ocean. The right to navigate both (the lakes and the ocean) includes that of passing from one to the other through the natural link. Was it then reasonable or just that one of the two co-proprietors of the lakes should altogether exclude his associate from the use of a common bounty of nature, necessary to the full enjoyment of them? The distinction between the right of passage, claimed by one nation through the territories of another, on land, and that on navigable water, though not always clearly marked by the writers on public law, has a manifest existence in the nature of things. In the former case, the passage can hardly ever take place, especially if it be of numerous bodies, without some detriment or inconvenience to the State whose territory is traversed. But in the case of a passage on water no such injury is sustained. The American government did not mean to contend for any principle, the benefit of which, in analogous circumstances, it would deny to Great Britain. If, therefore, in the further progress of discovery, a connection should be developed between the river Mississippi and Upper Canada, similar to that which exists between the United States and the St. Lawrence, the American government would be always ready to apply, in respect to the Mississippi, the same principles it contended for in respect to the St. Law-

(*a*) British Paper on the Navigation of the St. Lawrence. Session, 1827—28, No. 43, p. 41.

rence. But the case of rivers, which rise and debouch altogether within the limits of the same nation, ought not to be confounded with those which, having their sources and navigable portions of their streams in States above, finally discharge themselves within the limits of other States below. In the former case, the question as to opening the navigation to other nations, depended upon the same considerations which might influence the regulation of other commercial intercourse with foreign States, and was to be exclusively determined by the local sovereign. But in respect to the latter the free navigation of the river was a natural right in the upper inhabitants, of which they could not be entirely deprived by the arbitrary caprice of the lower State. Nor was the fact of subjecting the use of this right to treaty regulations, as was proposed at Vienna to be done in respect to the navigation of the European rivers, sufficent to prove that the origin of the right was conventional, and not natural. It often happened to be highly convenient, if not sometimes indispensable, to avoid controversies by prescribing certain rules for the enjoyment of a natural right. The law of nature, though sufficiently intelligible in its great outlines and general purposes, does not always reach every minute detail which is called for by the complicated wants and varieties of modern navigation and commerce. Hence the right of navigating the ocean itself, in many instances, principally incident to a state of war, is subjected, by innumerable treaties, to various regulations. These regulations—the transactions of Vienna, and other analogous stipulations—should be regarded only as the spontaneous homage of man to the paramount Lawgiver of the universe, by delivering his great works from the artificial shackles and selfish contrivances to which they have been arbitrarily and unjustly subjected (*b*).

§ 205a. Treaty of Washington, 1871, as to the St. Lawrence.

It is now settled by the Treaty of Washington, 1871, that "The navigation of the river St. Lawrence, ascending and descending, from the 45th parallel of north latitude, where it ceases to form the boundary between the two countries, from, to, and into the sea, shall for ever remain free and open for the purposes of commerce to the citizens of the United States, subject to any laws and regulations of Great Britain, or

(*b*) Mr. Secretary Clay's Letter to Mr. Gallatin, June 19, 1826. Session 1827–1828, No. 43, p. 18.

of the Dominion of Canada, not inconsistent with such privilege of free navigation" (c).

§ 205b The Suez Canal.

The Suez Canal occupies a singular position in international law. It has become a highway of nations of the utmost importance. It is situated entirely in the territory of one State, and is the property of a mercantile association. The inconvenience of closing it directly, or indirectly by neglecting to dredge the bottom and repair the banks, would be immense, and would be felt more in England than elsewhere, as upwards of seventy-four per cent. of the whole shipping that passes through is British. These considerations induced the English government, in 1875, to purchase from the Khedive of Egypt a large number of shares in the canal, which the latter owned in his private capacity of shareholder.

Lord Derby has expressed an opinion that it will be most desirable to buy up the rights of the shareholders, and to replace the company by a syndicate, in which all the maritime powers shall be represented. His Lordship, however, denies it to be the present intention of Her Majesty's government to impose its will upon the company, or to endeavour to control its decisions (d).

Sir Travers Twiss proposed, in 1875, that the canal should be neutralized on terms similar to those upon which England and America agreed, with regard to the Panama Canal, when that work should be completed (e). Such an arrangement would not be incompatible with the independence of the Porte; and a similar plan has been carried out with regard to the mouths of the Danube, which are entirely within Turkish territory (f). The recent Turko-Russian war (1877), gave rise to apprehensions, lest either of the belligerents should endeavour to close the canal, or commit acts of hostility in or near it, and strong opinions were expressed in the British Parliament to the effect that England would insist on the canal being kept open. M. de Lesseps, the engineer and president of the company to which the canal belongs, on the 10th of May, 1877, laid before Lord Derby a proposal for its neutralization. His Lordship declined to accept the scheme as put forward by M. de Lesseps, but he "intimated to the Russian ambassador that an attempt to blockade, or otherwise to interfere with the canal or its approaches would be regarded by Her Majesty's government as a menace to India, and as a grave injury to the commerce of the world." "Any such step would be incompatible with the maintenance by Her Majesty's government of an attitude of passive neutrality." "Her Majesty's government will expect that the Porte and the Khedive, will on their side abstain from impeding the navigation of the canal, or adopting any measures likely to injure the canal or its approaches, and they are firmly determined not to permit the canal to be made the scene of any combat, or other warlike operations" (g).

(c) [Art. xxvi. Treaty of Washington, 1871. See Appendix E. p. 699].
(d) [Documents Diplomatiques, Nov. 1875, pp. 203, 204].
(e) [Revue de Droit International, 1875, p. 690].
(f) [See Hertslet, Map of Europe by Treaty, vol. iii. p. 1922].
(g) [Lord Derby to Lord Lyons, 16th May, 1877. Parl. Papers, Egypt, No. 1 (1877)].

PART THIRD.

INTERNATIONAL RIGHTS OF STATES IN THEIR PACIFIC RELATIONS.

CHAPTER I.

RIGHTS OF LEGATION.

§ 206. Usage of permanent diplomatic missions.

THERE is no circumstance which marks more distinctly the progress of modern civilization, than the institution of permanent diplomatic missions between different States. The rights of ambassadors were known, and, in some degree, respected by the classic nations of antiquity. During the middle ages they were less distinctly recognized, and it was not until the seventeenth century that they were firmly established. The institution of resident permanent legations at all the European courts took place subsequently to the Peace of Westphalia, and was rendered expedient by the increasing interest of the different States in each other's affairs, growing out of more extensive commercial and political relations, and more refined speculations respecting the balance of power, giving them the right of mutual inspection as to all transactions by which that balance might be affected. Hence the rights of legation have become definitely ascertained and incorporated into the international code.

§ 207. Right to send, and obligation to receive public ministers.

Every independent State has a right to send public ministers to, and receive ministers from, any other sovereign State with which it desires to maintain the relations of peace and amity. No State, strictly speaking, is obliged, by the positive law of nations, to send or receive public ministers, although the usage and comity of nations seem to have established a sort of reciprocal duty in this respect. It is evident, however, that this cannot be more than an imperfect obligation, and must be modified by the nature and importance of the rela-

tions to be maintained between different States by means of diplomatic intercourse (*a*).

§ 208. Rights of legation, to what States belonging.

How far the rights of legation belong to dependent or semi-sovereign States, must depend upon the nature of their peculiar relation to the superior State under whose protection they are placed. Thus, by the treaty concluded at Kainardgi, in 1774, between Russia and the Porte, the provinces of Moldavia and Wallachia, placed under the protection of the former power, have the right of sending chargés d'affaires of the Greek communion to represent them at the court of Constantinople (*b*).

So also of confederated States; their right of sending public ministers to each other, or to foreign States, depends upon the peculiar nature and constitution of the union by which they are bound together. Under the constitution of the former German Empire, and that of the Germanic Confederation, this right was preserved to all the princes and States composing the federal union (*c*). Such was also the former Constitution of the United Provinces of the Low Countries, and such is now that of the Swiss Confederation. By the Constitution of the United States of America every State is expressly forbidden from entering, without the consent of Congress, into any treaty, alliance, or confederation, with any other State of the Union, or with a foreign State, or from entering, without the same consent, into any agreement or compact with another State, or with a foreign power. The original power of sending and receiving public ministers is essentially modified, if it be not entirely taken away, by this prohibition (*d*).

§ 209. How affected by

The question, to what department of the government be-

(*a*) Vattel, Droit des Gens, liv. iv. ch. 5, §§ 55—65. Rutherforth's Institutes, vol. ii. b. ii. ch. 9, § 20. Martens, Précis du Droit des Gens Moderne de l'Europe, liv. vii. ch. 1, §§ 187—190.

(*b*) Vattel, liv. iv. ch. 5, § 60. Klüber, Droit des Gens Moderne de l'Europe, st. 2, tit. 2, ch. 3, § 175. Merlin, Répertoire, tit. *Ministre publique*, sect. ii. § 1, No. 3, 4. [Roumania, as these united provinces are now called, has now acquired complete independence, which is recognised by the Treaty of Berlin. This State has therefore the right of sending diplomatic representatives to the Porte, and to other countries, on the same terms as other independent States. See Treaty of Berlin in Appendix F. p. 725].

(*c*) [It is now merged in that of the German empire].

(*d*) Heffter, das Europaische Volkerrecht, § 200. Merlin, Répertoire, tit. *Ministre publique*, sect ii. §. 1, No. 5. [As to the reception of the Dutch ambassadors in the sixteenth century, see Motley's Life of John Barneveld, vol. i. ch. 1.]

civil war or contest for the sovereignty.

longs the right of sending and receiving public ministers, also depends upon the municipal constitution of the State. In monarchies, whether absolute or constitutional, this prerogative usually resides in the sovereign. In republics, it is vested either in the chief magistrate, or in a senate or council, conjointly with, or exclusive of, such magistrate. In the case of a revolution, civil war, or other contest for the sovereignty, although, strictly speaking, the nation has the exclusive right of determining in whom the legitimate authority of the country resides, yet foreign States must of necessity judge for themselves whether they will recognize the government *de facto*, by sending to, and receiving ambassadors from, it; or whether they will continue their accustomed diplomatic relations with the prince whom they choose to regard as the legitimate sovereign, or suspend altogether these relations with the nation in question. So, also, where an empire is severed by the revolt of a province or colony declaring and maintaining its independence, foreign States are governed by expediency in determining whether they will commence diplomatic intercourse with the new State, or wait for its recognition by the metropolitan country (*e*).

For the purpose of avoiding the difficulties which might arise from a formal and positive decision of these questions, diplomatic agents are frequently substituted, who are clothed with the powers, and enjoy the immunities of ministers, though they are not invested with the representative character, nor entitled to diplomatic honours.

§ 209a. Communication with rebels.

It was on this footing that Messrs. Slidell and Mason, the emissaries of the Confederate States, who were seized on board *The Trent*, were sent to Europe (*f*). During the continuance of a rebellion, although foreign States may refuse to recognise the insurgents in any way, or to enter into regular diplomatic intercourse with them, it sometimes becomes necessary for the protection of their own commerce and subjects, that foreign States should communicate with the rebel authorities. Lord Russell has laid it down that "Her Majesty's Government hold it to be an undoubted principle of international law, that when the persons or the property of the subjects or citizens of a State are injured by a de-

(*e*) *Vide suprà*, Pt. I. ch. 2, §§ 23—27. Merlin, Répertoire, tit. *Ministre Publique*, sect. ii. § 6.

(*f*) [Wheaton, by Lawrence, p. 378, n. 118. Parl. Papers, N. America, 1862 (No. 5), p. 34. See *ante*, Pt. II. ch. 2, § 109 *b*].

facto government, the State so aggrieved has a right to claim from the *de facto* government redress and reparation; and also that in cases of apprehended losses or injury to their subjects, States may lawfully enter into communication with *de facto* governments to provide for the temporary security of the persons and property of their subjects" (*g*).

§ 210. Conditional reception of foreign ministers.

As no State is under a perfect obligation to receive ministers from another, it may annex such conditions to their reception as it thinks fit; but when once received, they are in all other respects entitled to the privileges annexed by the law of nations to their public character. Thus some governments have established it as a rule not to receive one of their own native subjects as a minister from a foreign power; and a government may receive one of its own subjects under the expressed condition that he shall continue amenable to the local laws and jurisdiction. So also one court may refuse to receive a particular individual as minister from another court, alleging the motives on which such refusal is grounded (*h*).

§ 211. Classification of public ministers.

The primitive law of nations makes no other distinction between the different classes of public ministers, than that which arises from the nature of their functions; but the modern usage of Europe having introduced into the voluntary law of nations certain distinctions in this respect, which, for want of exact definition, became the perpetual source of controversies, uniform rules were at last adopted by the Congress of Vienna, and that of Aix-la-Chapelle, which put an end to those disputes. By the rules thus established, public ministers are divided into the four following classes:

1. Ambassadors, and papal legates or nuncios.
2. Envoys, ministers, or others accredited to sovereigns (auprès des souverains).
3. Ministers resident accredited to sovereigns.
4. Chargés d'affaires accredited to the minister of foreign affairs (*i*).

(*g*) [Earl Russell to Mr. Adams, 26th Nov. 1861. U. S. Dipl. Cor. 1862, p. 8].

(*h*) Bynkershoek, de Foro Legatorum, cap. 11, § 10. Martens, Manuel Diplomatique, ch. 1, § 6. Merlin, Répertoire, tit. *Ministre Publique*, sect. iii. § 5.

(*i*) The *recez* of the Congress of Vienna of the 19th of March, 1815, provides:—

"Art. 1. Les employés diplomatiques sont partagés en trois classes:

"Celle des ambassadeurs, légats ou nonces;

"Celle des envoyés, ministres, ou autres accrédités auprès des souverains;

§ 212. Ambassadors.

Ambassadors and other public ministers of the first class are exclusively entitled to what is called the *representative* character, being considered as peculiarly representing the sovereign or State by whom they are delegated, and entitled to the same honours to which their constituent would be entitled, were he personally present. This must, however, be taken in a general sense, as indicating the sort of honours to which they are entitled; but the exact ceremonial to be observed towards this class of ministers depends upon usage, which has fluctuated at different periods of European history. There is a slight shade of difference between ambassadors ordinary and extraordinary; the former designation being exclusively applied to those sent on permanent missions, the latter to those employed on a particular or extraordinary occasion, though it is sometimes extended to those residing at a foreign court for an indeterminate period (*k*).

The right of sending ambassadors is exclusively confined to crowned heads, the great republics, and other States entitled to royal honours (*l*).

"Celle des chargés d'affaires accrédités auprès des ministres chargés des affaires étrangères.

"Art. 2. Les ambassadeurs, légats ou nonces, ont seuls le caractère représentatif.

"Art. 3. Les employés diplomatiques en mission extraordinaire, n'ont, à ce titre, aucune supériorité de rang.

"Art. 4. Les employés diplomatiques prendront rang, entre eux, dans chaque classe, d'après la date de la notification officielle de leur arrivée.

"Le présent réglement n'apportera aucune innovation relativement aux représentans du Pape.

"Art. 5. Il sera déterminé dans chaque état une mode uniforme pour la réception des employés diplomatiques de chaque classe.

"Art. 6. Les liens de parenté ou d'alliance de famille entre les cours, ne donnent aucun rang à leurs employés diplomatiques.

"Il en est de même des alliances politiques.

"Art. 7. Dans les actes ou traités entre plusieurs puissances, qui admettent l'alternat, le sort décidera, entre les ministres, de l'ordre qui devra être suivi dans les signatures."

The protocol of the Congress of Aix-la-Chapelle of the 21st November, 1818, declares:

"Pour éviter les discussions désagréables qui pourraient avoir lieu à l'avenir sur un point d'étiquette diplomatique, que l'annexe du recez de Vienne, par lequel les questions de rang ont été réglées, ne parait pas avoir prévu, il est arrêté entre les cinq cours, que les ministres résidens, accrédités auprès d'elles formeront, par rapport à leur rang, une classe intermédiaire entre les ministres du second ordre et les chargés d'affaires."

(*k*) Vattel, Droit des Gens, liv. iv. ch. 6, §§ 70—79. Martens, Précis du Droit des Gens Moderne de l'Europe, liv. vii. ch. 9, § 192. Martens, Manuel Diplomatique, ch. 1, § 9.

(*l*) Martens, Précis, &c., liv. vii. ch. 2, § 198. *Vide ante*, Pt. II. ch. 3, § 153.

§ 213. Ministers of the second class.

All other public ministers are destitute of that particular character which is supposed to be derived from representing generally the person and dignity of the sovereign. They represent him only in respect to the particular business committed to their charge at the court to which they are accredited (*m*).

Ministers of the second class are envoys, envoys extraordinary, and ministers plenipotentiary, while those of the pope are called internuncios (*n*).

§ 214. Diplomatic precedence.

So far as the relative rank of diplomatic agents may be determined by the nature of their respective functions, there is no essential difference between public ministers of the first class and those of the second. Both are accredited by the sovereign, or supreme executive power of the State, to a foreign sovereign. The distinction between ambassadors and envoys was originally grounded upon the supposition, that the former are authorized to negotiate directly with the sovereign himself; whilst the latter, although accredited to him, are only authorized to treat with the minister of foreign affairs or other person empowered by the sovereign. The authority to treat directly with the sovereign was supposed to involve a higher degree of confidence, and to entitle the person, on whom it was conferred, to the honours due to the highest rank of public ministers. This distinction, so far as it is founded upon any essential difference between the functions of the two classes of diplomatic agents, is more apparent than real. The usage of all times, and especially the more recent times, authorizes public ministers of every class to confer, on all suitable occasions, with the sovereign at whose court they are accredited, on the political relations between the two States. But even at those periods when the etiquette of European courts confined this privilege to ambassadors, such verbal conferences with the sovereign were never considered as binding official acts. Negotiations were then, as now, conducted and concluded with the minister of foreign affairs, and it is through him that the determinations of the sovereign are made known to foreign ministers of every class. If this observation be applicable as between States, according to

(*m*) Martens, Manuel Diplomatique, ch. 1, § 10.
(*n*) Ibid.

whose constitutions of government negotiations may, under certain circumstances, be conducted directly between their respective sovereigns, it is still more applicable to representative governments, whether constitutional monarchies or republics. In the former, the sovereign acts, or is supposed to act, only through his responsible ministers, and can only bind the State and pledge the national faith through their agency. In the latter, the supreme executive magistrate cannot be supposed to have any relations with a foreign sovereign, such as would require or authorize direct negotiations between them respecting the mutual interests of the two States (*o*).

§ 215. Ministers of the third class.

In the third class are included ministers, ministers resident, residents, and ministers chargés d'affaires, accredited to sovereigns (*p*).

Chargés d'affaires, accredited to the ministers of foreign affairs of the court at which they reside, are either chargés d'affaires *ad hoc*, who are originally sent and accredited by their governments, or chargés d'affaires *per interim*, substituted in the place of the minister of their respective nations during his absence (*q*).

According to the rule prescribed by the Congress of Vienna, and which has since been generally adopted, public ministers take rank between themselves, in each class, according to the date of the official notification of their arrival at the court to which they are accredited (*r*).

The same decision of the Congress of Vienna has also abolished all distinctions of rank between public ministers, arising from consanguinity and family or political relations between their different courts (*s*).

A State which has a right to send public ministers of different classes, may determine for itself what rank it chooses to confer upon its diplomatic agents; but usage generally requires that those who maintain permanent missions near the government of each other should send and receive ministers of equal rank. One minister may represent his

(*o*) Pinheiro-Ferreira, Notes to Martens, Précis du Droit des Gens, tom. ii. Notes 12, 14.
(*p*) Martens, Précis, &c., liv. vii. ch. 2, § 194.
(*q*) Martens, Manuel Diplomatique, ch. 1, § 11.
(*r*) Recez du Congrès de Vienne du 19 Mars, 1815, art. 4.
(*s*) Ibid., art. 6.

sovereign at different courts, and a State may send several ministers to the same court. A minister or ministers may also have full powers to treat with foreign States, as at a Congress of different nations, without being accredited to any particular court (*t*).

§ 216. Consuls.

Consuls, and other commercial agents, not being accredited to the sovereign or minister of foreign affairs, are not, in general, considered as public ministers; but the consuls maintained by the Christian Powers of Europe and America near the Barbary States are accredited and treated as public ministers (*u*).

§ 217. Letters of credence.

Every diplomatic agent, in order to be received in that character, and to enjoy the privileges and honours attached to his rank, must be furnished with a letter of credence. In the case of an ambassador, envoy, or minister, of either of the three first classes, this letter of credence is addressed by the sovereign, or other chief magistrate of his own State, to the sovereign or State to whom the minister is delegated. In the case of a chargé d'affaires, it is addressed by the secretary, or minister of State charged with the department of foreign affairs, to the minister of foreign affairs of the other government. It may be in the form of a *cabinet letter*, but is more generally in that of a *letter of council*. If the latter, it is signed by the sovereign or chief magistrate, and sealed with the great seal of State. The minister is furnished with an authenticated copy, to be delivered to the minister of foreign affairs, on asking an audience for the purpose of delivering the original to the sovereign, or other chief magistrate of the State, to whom he is sent. The letter of credence states the general object of his mission, and requests that full faith and credit may be given to what he shall say on the part of his court (*x*).

§ 218. Full power.

The full power, authorizing the minister to negotiate, may be inserted in the letter of credence, but it is more usually drawn up in the form of letters-patent. In general, ministers

(*t*) Martens, Précis, &c., liv. vii. ch. 2, §§ 199—204.

(*u*) Bynkershoek, de Foro Competent. Legat. cap. 10, §§ 4—6. Martens, Manuel Diplomatique, ch. 1, § 13. Vattel, liv. ii. ch. 2, § 34. Wicquefort, de l'Ambassadeur, liv. i. § 1, p. 63.

(*x*) Martens, Précis, &c., liv. vii. ch. 3, § 202. Wicquefort, de l'Ambassadeur, liv. i. § 15.

sent to a Congress are not provided with a letter of credence, but only with a full power, of which they reciprocally exchange copies with each other, or deposit them in the hands of the mediating power or presiding minister (*y*).

§ 219. Instructions.

The instructions of the minister are for his own direction only, and not to be communicated to the government to which he is accredited, unless he is ordered by his own government to communicate them *in extenso*, or partially; or unless, in the exercise of his discretion, he deems it expedient to make such a communication (*z*).

§ 219a. Communication of instructions.

Some States refuse to receive communications from foreign ministers, either on all or on particular topics, unless a copy is at the same time given to their own minister. In 1825, Canning was informed that the Russian ambassador was about to read him a despatch from St. Petersburg, relating to British policy in South America, but that he would not leave him a copy. At the interview Canning declined to allow the reading of the despatch to commence if no copy would be left, on the ground that he could not, at a single hearing, take in the full bearing of the document, nor weigh its expressions sufficiently to return a suitable reply (*a*).

§ 220. Passport.

A public minister, proceeding to his destined post in time of peace requires no other protection than a passport from his own government. In time of war, he must be provided with a safe conduct or passport, from the government of the State with which his own country is in hostility, to enable him to travel securely through its territories (*b*).

§ 221. Duties of a public minister, on arriving at his post.

It is the duty of every public minister, on arriving at his destined post, to notify his arrival to the minister of foreign affairs. If the foreign minister is of the first class, this notification is usually communicated by a secretary of embassy or legation, or other person attached to the mission, who hands to the minister of foreign affairs a copy of the letter of credence, at the same time requesting an audience of the sovereign for his principal. Ministers of the second and third classes generally notify their arrival by letter to the

(*y*) Wicquefort, liv. i. § 16. Martens, Précis, &c., liv. vii. ch. 3, § 204. Manuel Diplomatique, ch. 2, § 17.

(*z*) Manuel Diplomatique, ch. 2, § 16.

(*a*) [Calvo, Droit International (2nd ed.), vol. i. § 430, p. 550].

(*b*) Vattel, liv. iv. ch. 7, § 85. Manuel Diplomatique, ch. 2, § 19. Flassan, Histoire de la Diplomatie Française, tom. v. p. 246.

minister of foreign affairs, requesting him to take the orders of the sovereign, as to the delivery of their letters of credence. Chargés d'affaires, who are not accredited to the sovereign, notify their arrival in the same manner, at the same time requesting an audience of the minister of foreign affairs for the purpose of delivering their letters of credence.

§ 222. Audience of the sovereign, or chief magistrate

Ambassadors, and other ministers of the first class, are entitled to a *public* audience of the sovereign; but this ceremony is not necessary to enable them to enter on their functions, and, together with the ceremony of the *solemn entry*, which was formerly practised with respect to this class of ministers, is now usually dispensed with, and they are received in a *private* audience, in the same manner as other ministers. At this audience, the letter of credence is delivered, and the minister pronounces a complimentary discourse, to which the sovereign replies. In republican States, the foreign minister is received in a similar manner, by the chief executive magistrate or council, charged with the foreign affairs of the nation (*c*).

§ 223. Diplomatic etiquette.

The usage of civilized nations has established a certain etiquette, to be observed by the members of the diplomatic corps, resident at the same court, towards each other, and towards the members of the government to which they are accredited. The duties which comity requires to be observed, in this respect, belong rather to the code of manners than of laws, and can hardly be made the subject of positive sanction; but there are certain established rules in respect to them, the non-observance of which may be attended with inconvenience in the performance of more serious and important duties. Such are the visits of etiquette, which the diplomatic ceremonial of Europe requires to be rendered and reciprocated, between public ministers resident at the same court (*d*).

§ 224. Privileges of a public minister.

From the moment a public minister enters the territory of the State to which he is sent, during the time of his residence, and until he leaves the country, he is entitled to an entire exemption from the local jurisdiction, both civil and criminal. Representing the rights, interests, and dignity of

(*c*) Martens, Manuel Diplomatique, ch. 4, §§ 33—36.
(*d*) Manuel Diplomatique, ch. 4, § 37.

the sovereign or State by whom he is delegated, his person is sacred and inviolable. To give a more lively idea of this complete exemption from the local jurisdiction, the fiction of extra-territoriality has been invented, by which the minister, though actually in a foreign country, is supposed still to remain within the territory of his own sovereign. He continues still subject to the laws of his own country, which govern his personal *status* and rights of property, whether derived from contract, inheritance, or testament. His children born abroad are considered as natives. This exemption from the local laws and jurisdiction is founded upon mutual utility, growing out of the necessity that public ministers should be entirely independent of the local authority, in order to fulfil the duties of their mission. The act of sending the minister on the one hand, and of receiving him on the other, amounts to a tacit compact between the two States that he shall be subject only to the authority of his own nation (*e*).

The passports or safe conduct, granted by his own government in time of peace, or by the government to which he is sent in time of war, are sufficient evidence of his public character for this purpose (*f*).

§ 224a. Inviolability and exterritoriality.

Halleck draws a distinction between the *inviolability* and the *exterritoriality* of a public minister. He says, "the former is not a consequence of the latter, but the latter was invented for the purpose of giving security to the former. The mere fact of a public minister being regarded as a foreigner, resident in a foreign country, would not, of itself, necessarily exempt him from local jurisdiction. . . . . The true basis of all diplomatic privilege consists in the idea of inviolability which international jurisprudence attaches to his person and his office, and from which it cannot be severed. This idea of inviolability is an inherent and essential quality of the public minister, and the office cannot exist without it. International law has conferred it upon the State or sovereign which he represents, and to divest him of that quality is to divest him of his office, as the two are inseparable. Not so with the fiction of exterritoriality. So far as that is not necessary to the exercise of his functions, or, in other words, to secure his inviolability, it

(*e*) Grotius, de Jur. Bel. ac Pac. lib. ii. cap. 18, § 1—6. Rutherforth's Inst. vol. ii. b. ii. ch. 9, § 20. Wicquefort, de l'Ambassadeur, liv. i. § 27. Bynkershoek, de Jure Competent. Legat. cap. 5, 8. Vattel, Droit des Gens, liv. iv. ch. 7, §§ 81—125. Martens, Précis, &c., liv. vii. ch. 5, §§ 214—218. Klüber, Droit des Gens Moderne de l'Europe, Pt. II. tit. 2, § 203. Fœlix, Droit International Privé, § 184. Wheaton, Hist. Law of Nations, pp. 237—243.

(*f*) Vattel, liv. iv. ch. 7, § 83.

is not an essential quality of the public minister, and therefore may be dispensed with by renouncement or otherwise" (*g*).

§ 225. Exceptions to the general rule of exemption from the local jurisdiction.

This immunity extends, not only to the person of the minister, but to his family and suite, secretaries of legation and other secretaries, his servants, moveable effects, and the house in which he resides (*h*).

§ 225a. Minister's house.

The absolute exterritoriality of a minister's house was recently disputed by the French Government. In April, 1867, one Mickilchenkorff, a Russian subject, appeared at the Russian embassy in Paris, and made a demand which was refused. Thereupon he assaulted one of the attachés with a dagger, wounded him, and injured two other persons who came to the rescue. The police being applied to, entered the house and removed the culprit, who was afterwards brought before the *Cour d'Assise*. The Russian ambassador, who was absent when the crime was committed, on his return demanded that the prisoner should be sent to Russia, on the ground that the act having been committed in his hotel, the French courts had no jurisdiction, and the case must be tried in Russia. The French Government refused to give up the prisoner, urging that the principle of exterritoriality did not cover the case of a stranger entering the minister's house, and there committing a crime; and that even if it did, the parties themselves had in this particular case waived the privilege by summoning the local police. The Russian Government finally admitted the jurisdiction of the French court, and the prisoner was duly tried by the local law (*i*).

The minister's person is in general entirely exempt both from the civil and criminal jurisdiction of the country where he resides. To this general exemption, there may be the following exceptions:—

1. This exemption from the jurisdiction of the local tribunals and authorities does not apply to the *contentious* jurisdiction which may be conferred on those tribunals by the minister voluntarily making himself a party to a suit at law (*k*).

§ 225b. Suits by and against ministers.

It has been held in England that an ambassador, having no real property in the country, and having done nothing to disentitle him to the general privileges of his office, cannot, while he remains such ambas-

(*g*) [Halleck, ch. ix. § 13, p. 210].

(*h*) Grotius, de Jur. Bel. ac Pac. lib. ii. cap. xviii. §§ 8, 9. Bynkershoek, de Foro Competent. Legat. cap. 13, § 5; cap. 15, 20. Vattel, liv. iv. ch. 8, § 113; ch. 9, §§ 117—123. Martens, Précis, &c., liv. vii. ch. 5, §§ 215—227; ch. 9, §§ 234—237. Fœlix, §§ 184—186.

(*i*) [Calvo, Droit International, vol. i. § 521, p. 650].

(*k*) Bynkershoek, cap. 16, § 13—15. Vattel, liv. iv. ch. 8, § 111. Martens, Précis, liv. vii. ch. 5, § 216. Merlin, Rep. tit. *Ministre*, s. 5, § 4, No. 10.

sador, be sued in England against his will, although the suit may arise out of commercial transactions by him here, and although neither his person nor his goods are touched by the suit (*l*). But if the ambassador appears and submits to the jurisdiction, the action can then be proceeded with (*m*). The constitution of the United States vests the exclusive jurisdiction "of all suits or proceedings against ambassadors, or other public ministers, or their domestics, or domestic servants, or against consuls or vice-consuls," in the courts of the United States, to the exclusion of the State courts (*n*). If an ambassador contracts debts which he refuses to pay, and if he also refuses to submit to the jurisdiction, creditors have no remedy but to apply to the Minister for Foreign Affairs of the ambassador's own country (*o*).

§ 225 c. Foreign ministers in England.

The immunities of ambassadors in England are partially defined by a statute of the reign of Queen Anne, which recites that "whereas several turbulent and disorderly persons having in a most outrageous manner insulted the person of his Excellency Andrew Artemonowitz Mattueof ambassador extraordinary of his Czarish Majesty, Emperor of Great Russia, by arresting him and taking him by violence out of his coach in the public street, and detaining him in custody for several hours, in contempt of the protection granted by Her Majesty, contrary to the law of nations, and in prejudice of the rights and privileges which ambassadors and other public ministers, authorized and received as such, have at all times been thereby possessed of, and ought to be kept sacred and inviolable;" it was therefore enacted, "that all writs and processes that shall at any time hereafter be sued forth or prosecuted, whereby the person of any ambassador, or other public minister of any foreign prince or State . . . . . or the domestick or domestick servant of any such ambassador, or other public minister, may be arrested or imprisoned, or his or their goods or chattels may be distrained, seized or attached, shall be deemed or adjudged to be utterly null and void to all intents, constructions, and purposes whatsoever" (*p*). But no merchant or trader who puts himself into the service of an ambassador, shall have the benefit of the Act, and every ambassador's servant must be registered to entitle him to exemption from process (*q*). If the ambassador himself engage in trade, he does not thereby forfeit the privilege conferred by the statute (*r*).

2. If he is a citizen or subject of the country to which he is sent, and that country has not renounced its authority over

(*l*) [*Magdalena Steam Navig. Co.* v. *Martin*, 2 E. & E. 94].

(*m*) [*Taylor* v. *Best*, 14 C. B. 521; *Gladstone* v. *Musurus Bey*, 9 Jur. N. S. 71. Halleck, ch. ix. § 17, p. 216. And see *U. S.* v. *Hand*, 2 Washington, C. C. 435].

(*n*) [U. S. Revised Statutes, tit. xiii. ch. 12, sec. 711. *U. S.* v. *Ravara*, 2 Dallas, 297; *Cohens* v. *Virginia*, 6 Wheaton, 407; *St. Luke's Hospital* v. *Barkley*, 3 Blatchford, 259].

(*o*) [Calvo, Droit International, vol. i. § 522].

(*p*) [7 Anne, c. 12, sec. 3].

(*q*) [Ibid., sec. 5].

(*r*) [*Barbuit's case*, Cas. Temp. Talbot, 281; *Taylor* v. *Best*, 14 C. B. 487].

him, he remains still subject to its jurisdiction. But it may be questionable whether his reception as a minister from another power, without any express reservation as to his previous allegiance, ought not to be considered as a renunciation of this claim, since such reception implies a tacit convention between the two States that he shall be entirely exempt from the local jurisdiction (*s*).

3. If he is at the same time in the service of the power who receives him as a minister, as sometimes happens among the German courts, he continues still subject to the local jurisdiction (*t*).

4. In case of offences committed by public ministers affecting the existence and safety of the State where they reside, if the danger is urgent, their persons and papers may be seized, and they may be sent out of the country. In all other cases, it appears to be the established usage of nations to request their recall by their own sovereign, which, if unreasonably refused by him, would unquestionably authorize the offended State to send away the offender. There may be other cases which might, under circumstances of sufficient aggravation, warrant the State thus offended in proceeding against an ambassador as a public enemy, or in inflicting punishment upon his person if justice should be refused by his own sovereign. But the circumstances which would authorize such a proceeding are hardly capable of precise definition, nor can any general rule be collected from the examples to be found in the history of nations where public ministers have thrown off their public character and plotted against the safety of the State to which they were accredited. These anomalous exceptions to the general rule resolve themselves into the paramount right of self-preservation and necessity. *Grotius* distinguishes here between what may be done in the way of self-defence and what may be done in the way of punishment. Though the law of nations will not allow an ambassador's life to be taken away as a punishment for a crime after it has been committed, yet this law does not oblige the State to suffer him to use violence without endeavouring to resist it (*u*).

(*s*) Bynkershoek, cap. 11. Vattel, liv. iv. ch. 8 § 112.
(*t*) Martens, Manuel Diplomatique, ch. 3, § 23.
(*u*) Grotius, de Jur. Bel. ac Pac. lib. ii. cap. 18, § 4. Rutherforth's Inst.

§ 225 d. Instances of the expulsion of ambassadors.

Several instances are to be found in history of ambassadors being seized and sent out of the country. The Bishop of Ross, ambassador of Mary Queen of Scots, was imprisoned and then banished from England, for conspiring against the sovereign, while the Duke of Norfolk and other conspirators were tried and executed (*x*). In 1584, De Mendoza, the Spanish ambassador in England, was ordered to quit the realm for conspiring to introduce foreign troops and dethrone Queen Elizabeth (*y*). In 1654, De Bass, the French Minister, was ordered to depart the country in twenty-four hours, on a charge of conspiracy against the life of Cromwell (*z*). In 1717, Gyllenborg, the Swedish ambassador, contrived a plot to dethrone George I. He was arrested, his cabinet broken open and searched, and his papers seized. Sweden arrested the British minister at Stockholm by way of reprisal. The Regent of France interposed his good offices, and the two ambassadors were shortly afterwards exchanged (*a*). The arrest of Gyllenborg was necessary as a measure of self defence, but on no principle of international law can the arrest of the British minister by Sweden be made justifiable. For similar reasons Cellamare, Spanish ambassador in France, was, in 1718, arrested, his papers seized, and himself conducted to the frontier by a military escort (*b*). So recently as 1848 Sir H. Bulwer, the British ambassador in Spain, had his passports returned, and was requested to leave Spanish territory by the government. Certain disturbances had taken place in various parts of Spain, and the government persuaded themselves that Sir H. Bulwer had lent his assistance to the disaffected. This proceeding caused diplomatic relations to be suspended between the two countries during two years, and the dispute was only settled by the mediation of the King of the Belgians (*c*).

If it appears that the ambassador has not fully entered upon his functions, either by his credentials not having been presented, or by his not having been fully invested with the character by his own country, he cannot then claim the inviolability attached to regular ambassadors (*d*).

§ 226. Personal exemption extending to his family, secretaries, servants, &c.

The wife and family, servants and suite, of the minister, participate in the inviolability attached to his public character. The secretaries of embassy and legation are especially entitled, as official persons, to the privileges of the diplomatic corps, in respect to their exemption from the local jurisdiction (*e*).

vol. ii. b. ii. ch. 9, § 20. Bynkershoek, de Foro Competent. Legat. cap. 17, 18, 19. Vattel, liv. iv. ch. 7, §§ 94—102. Martens, Précis, &c., liv. vii. ch. 5, § 218. Ward's Hist. of the Law of Nations, vol. ii. ch. 17, pp. 291—334. Wheaton, Hist. of Law of Nations, pp. 250—254.

(*x*) [Froude, Hist. of England, vol. x. p. 222, *et seq.* (ed. 1866)].

(*y*) [Ibid., vol. xi. p. 623].

(*z*) [Phillimore, vol. ii. § 164].

(*a*) [Hist. of England, Mahon, vol. i. p. 388, *et seq.*].

(*b*) [Ibid., vol. i. p. 484].

(*c*) [Calvo, Droit International, vol. i. § 523].

(*d*) [See case of Marquis de la Chetardie. Calvo, Droit International, vol. i. § 517. Case of Da Sa. 5 Howell, State Trials, 460].

(*e*) Grotius, lib. ii. cap. 18, § 8. Bynkershoek, cap. 15, 20. Vattel, liv. iv. ch. 9, § 120—123. Martens, Précis, &c., liv. vii. ch. 5, § 219; ch. 9, §§ 234

The municipal laws of some, and the usages of most nations require an official list of the domestic servants of foreign ministers to be communicated to the secretary or minister of foreign affairs, in order to entitle them to the benefit of this exemption (*f*).

It follows from the principle of the extra-territoriality of the minister, his family, and other persons attached to the legation, or belonging to his suite, and their exemption from the local laws and jurisdiction of the country where they reside, that the civil and criminal jurisdiction over these persons rests with the minister, to be exercised according to the laws and usages of his own country. In respect to civil jurisdiction, both contentious and voluntary, this rule is, with some exceptions, followed in the practice of nations. But in respect to criminal offences committed by his domestics, although in strictness the minister has a right to try and punish them, the modern usage merely authorizes him to arrest and send them for trial to their own country. He may, also, in the exercise of his discretion, discharge them from his service, or deliver them up for trial under the laws of the State where he resides; as he may renounce any other privilege to which he is entitled by the public law (*g*).

§ 227. Exemption of the minister's house and property.

The personal effects or movables belonging to the minister, within the territory of the State where he resides, are entirely exempt from the local jurisdiction; so, also, of his dwelling-house; but any other real property, or immovables, of which he may be possessed within the foreign territory, is subject to its laws and jurisdiction. Nor is the personal property of which he may be possessed as a merchant carrying on trade, or in a fiduciary character, as an executor, &c., exempt from the operation of the local laws (*h*).

§ 228. Discussion between

The question, how far the personal effects of a public minister are liable to be seized or detained, in order to

—237. Fœlix, § 184. [*Taylor* v. *Best*, 14 C. B. 487; *Dupont* v. *Pichon*, 4 Dallas (2nd ed.), 300.]

(*f*) Blackstone's Commentaries, vol. i. ch. 7. LL. of the United States, vol. i. ch. 9, § 26.

(*g*) Bynkershoek, cap. 15, 20. Vattel, liv. iv. ch. 9, § 124. Rutherforth's Inst. vol. ii. b. ii. ch. 9, § 20. Klüber, Pt. II. tit. 2, §§ 212—214. Merlin, Répertoire, tit. *Ministre Publique*, sect. vi.

(*h*) Vattel, liv. iv. ch. 8, §§ 113—115. Martens, Précis, &c., liv. vii. ch. 8, § 217. Klüber, Pt. II. tit. 2, ch. 3, § 210. Merlin, sect. v. § iv. No. 6.

the American and Prussian governments, respecting the exemption of public ministers from the local jurisdiction.

enforce the performance on his part of the contract of hiring of a dwelling-house, inhabited by him, has been recently discussed between the American and Prussian governments, in a case, the statement of which may serve to illustrate the subject we are treating.

The Prussian Civil Code declares, that "the lessor is entitled, as a security for the rent and other demands arising under the contract, to the rights of a *Pfandgläubiger*, upon the goods brought by the tenant upon the premises, and there remaining at the expiration of the lease."

The same code defines the nature of the right of a creditor whose debt is thus secured. "A real right, as to a thing belonging to another, assigned to any person as security for a debt, and in virtue of which he may demand to be satisfied out of the substance of the thing itself, is called *Unterpfands-Recht*" (*i*).

Under this law the proprietor of the house in which the minister of the United States accredited at the court of Berlin resided, claimed the right of detaining the goods of the minister found on the premises at the expiration of the lease in order to secure the payment of damages alleged to be due on account of injuries done to the house during the contract. The Prussian government decided that the general exemption, under the law of nations, of the personal property of foreign ministers from the local jurisdiction, did not extend to this case, where, it was contended, the right of detention was created by the contract itself, and by the legal effect given to it by the local law. In thus granting to the proprietor the rights of a creditor whose debt is secured by hypothecation, (*Pfandgläubiger*,) not only in respect to the rent, but as to all other demands arising under the contract, the Prussian Civil Code confers upon him a *real right* as to all the effects of the tenant, which may be found on the premises at the expiration of the lease, by means of which he may retain them, as a security for all his claims derived from the contract.

§ 229. Argument of the

It was stated, by the American minister, that this decision placed the members of the corps diplomatique, accredited at

(*i*) Allgemeines Landrecht für die Preussischen Staaten, Pt. I. tit. 21, § 395, tit. 30, § 1.

United States.

the Prussian court, on the same footing with the subjects of the country, as to the right which the Prussian code confers upon the lessor of distraining the goods of the tenant, to enforce the performance of the contract. The only reason alleged to justify such an exception to the general principle of exemption was, that the right in question was constituted by the contract itself. It was not pretended that such an exception had been laid down by any writer of authority on the law of nations; and this consideration alone presented a strong objection against its validity, it being notorious that all the exceptions to the principle were carefully enumerated by the most esteemed public jurists. Not only is such an exception not confirmed by them, but it is expressly repelled by these writers. Nor could it be pretended that the practice of a single government, in a single case, was sufficient to create an exception to a principle which all nations regarded as sacred and inviolable.

Doubtless, by the Prussian code, and that of most other nations, the contract of hiring gives to the proprietor the right of seizing, or detaining the goods of the tenant, for the non-payment of rent, or damages incurred by injuries done to the premises. But the question here was, not what are the rights conferred by the municipal laws of the country upon the proprietor, in respect to the tenant, who is a subject of that country; but what are those rights in respect to a foreign minister, whose dwelling is a sacred asylum; whose person and property are entirely exempt from the local jurisdiction; and who can only be compelled to perform his contracts by an appeal to his own government? Here the contract of hiring constitutes, *per se*, the right in question, in this sense only, that the law furnishes to one of the parties a special remedy to compel the other to perform its stipulations. Instead of compelling the lessor to resort to a personal action against the tenant, it gives him a lien upon the goods found on the premises. This lien may be enforced against the subjects of the country, because their goods are subject to its laws and its tribunals of justice; but it cannot be enforced against foreign ministers resident in the country, because they are subject neither to the one nor to the other.

Let us suppose that the contract in question had been a

bill of exchange drawn by the minister, not in the character of a merchant, but for defraying his ordinary expenses. The laws of every country, in such a case, entitle the holder of the bill to arrest the person of his debtor, in case of non-payment. It might be said, in the case supposed, that the contract itself gives the right of arresting the person, with the same reason that it was pretended, in the case in question, that it gave the right of seizing the goods of the debtor.

In fact, there was no one privilege of which a public minister might not be deprived, by the same mode of reasoning which was resorted to in order to deprive him of the exemption to which he was entitled as to his personal effects. But to deprive him of this right alone, would be to deprive him of that independence and security which are indispensably necessary to enable him to fulfil the duties he owes to his own government. If a single article of his furniture may be seized, it may all be seized, and the minister, with his family, thus be deprived of the means of subsistence. If the sanctity of his dwelling may be violated for this purpose, it may be violated for any other. If his private property may be taken upon this pretext, the property of his government, and even the archives of the legation, may be taken upon the same pretext.

§ 230. Opinion of Grotius.

The exemption of the goods of a public minister from every species of seizure for debt, is laid down by Grotius in the following manner:

"As to what respects the personal effects (*mobilia*) of an ambassador, which are considered as belonging to his person, they are not liable to seizure, neither for the payment nor for security of a debt, either by order of a court of justice, or, as some pretend, by command of the sovereign. This, in my judgment, is the soundest opinion; for an ambassador, in order to enjoy complete security, ought to be exempt from every species of restraint, both as to his person, and as to those things which are necessary for his use. If, then, he has contracted debts, and if, which is usually the case, he has no real property (*immobilia*) in the country, he should be politely requested to pay, and if he refuses, resort must be had to his sovereign" (*k*).

(*k*) Grotius, de Jur. Bel. ac Pac. lib. i. cap. 18, § 9.

We here perceive that this great man himself, both as a public minister and public jurist, was decidedly of opinion that the personal property of an ambassador could not be seized, either for the payment or for security of a debt; or, according to the original text,—*Ad solutionem debiti aut pignoris causâ*. Bynkershoek, in his treatise *De Foro competenti Legatorum*, cites with approbation this passage of Grotius.

§ 231. Opinion of Bynkershoek.

Bynkershoek himself, in commenting upon the declaratory edict of the States-General of the United Provinces, of 1679, exempting foreign ministers from arrest, and their effects from attachment, for debts contracted in the country, observes:—

"The declaration of the States-General does not materially differ from the opinion of Grotius, which I have quoted in the preceding chapter. To which we may add, that this author states, that the effects of an ambassador cannot be seized, either for payment or for security of a debt, because they are considered as appertaining to his person. Respecting this principle Antoine Mornac reports that, in the year 1608, Henry IV., king of France, pronounced against the legality of a seizure made at Paris, for the non-payment of rent, of the goods of the Venetian ambassador. This decision has been since constantly observed in every country.

"But this may be said to be carrying the privilege too far, since the seizure of the effects of an ambassador is not so much on account of the person as to a right in the thing thus seized; a right of which the proprietor cannot be deprived by the ambassador."

This author had here anticipated the argument of the Prussian government, to which he replies as follows:—

"But far from unduly pressing the principle, by the *effects* which are spoken of in the declaration of 1679 I understood only personal effects, that is to say, those which serve for the use of ambassadors (*id est utensilia*), as I shall point out in that part of this treatise where it will be necessary to speak of their property. It is of these effects that I affirm, that they are not, and never have been, according to the law of nations, considered as in the nature of a pledge, to secure the payment of what is due from an ambassador. I even

maintain that it is not lawful to seize them, either in order to institute a suit or to execute a judicial sentence" (l).

In his sixteenth chapter Bynkershock explains what he means by those effects which serve for the use of ambassadors, that is, *utensilia*. In this chapter he admits that the property, both personal and real, of a public minister, may, *in some cases*, be attached, to compel him to defend a suit commenced by those who might have a claim against him:—"I say the property (*bona*) in general, whether personal or real, unless they appertain to the person of the ambassador and he possess them, as ambassador; in a word, all those things without which he may conveniently perform the functions of his office. I except, then, from the number of those goods of the ambassador which may be thus attached, corn, wine, oil, every kind of provisions, furniture, gold, toilette ornaments, perfumes, drugs, clothing, carpets and tapestry, coaches, horses, mules, and all other things which may be comprised in the terms of the Roman law, *legati instructi et cum instrumento*."

In the following section he explains his doctrine, that certain effects of a public minister may be attached, in order to institute against him a suit, and to compel him to defend it, by showing that it is meant to be limited to the single case where the minister assumes on himself the character of a merchant, in which case the goods possessed by him, as such, may be attached for this purpose. "All these things," says he, "ought not, according to my view, to be excepted, unless they are destined for the use of the ambassador and his household. For it is not the same with corn, wine, and oil, for example, which an ambassador may have in his warehouses, for the purposes of trade; nor with horses and mules, which he may keep for the purpose of breeding and selling."

§ 232. Vattel.

Vattel is equally explicit as to the extent of the privilege in question. The only exception he admits to the general rule is that of a public minister who engages in trade, in which case his personal goods may be attached, to compel him to answer to a suit. To this exception he annexes two condi-

(*l*) Bynkershock, de For. Legat., cap. ix. §§ 9, 10.

tions, the latter of which was deemed decisive of the present question.

"Let us subjoin two explanations of what has just been said: 1. In case of doubt, the respect which is due to the character of a public minister requires the most favourable interpretation for the benefit of that character. I mean to say that where there is reason to doubt whether an article is really destined to the use of the minister and his household, or whether it belongs to his stock in trade, the question must be determined in favour of the minister; otherwise there might be danger of violating his privilege. 2. When I say that the effects of a minister, which have no connection with his character, and especially those belonging to his stock in trade, may be attached, this must be understood on the supposition that the attachment is not grounded on any matter relating to his concerns as minister; as, for instance, for supplies furnished to his household, for the rent of his hotel, &c." (*m*).

§ 233. Reply of Prussia.

In reply to those arguments and authorities it was urged, on behalf of the Prussian government, that if, in the present case, any Prussian authority had pretended to exercise a right of jurisdiction, either over the person of the minister or his property, the solution of the question would doubtless appertain to the law of nations, and it must be determined according to the precepts of that law. But the only question in the present case could be, what are the legal rights established by the contract of hiring, between the proprietor and the tenant. To determine this question, there could be no other rule than the civil law of the country where the contract was made, and where it was to be executed, that is, in the present case, the Civil Code of Prussia (*n*).

§ 234. Settlement of the question.

The controversy having been terminated, as between the parties, by the proprietor of the house restoring the effects which had been detained, on the payment of a reasonable compensation for the injury done to the premises, the Prussian government proposed to submit to the American government the following question:

(*m*) Vattel, Droit des Gens, liv. iv. ch. 8, § 114. Mr. Wheaton to Baron de Werther. Note verbale, 15 May, 1839.

(*n*) Baron de Werther to Mr. Wheaton. Note verbale, 19 May, 1839.

§ 235. Question proposed by Prussia.

"If a foreign diplomatic agent, accredited near the government of the United States, enters, of his own accord, and in the prescribed forms, into a contract with an American citizen; and if, under such contract, the laws of the country give to such citizen, in a given case, a *real right* (*droit réel*) over personal property (*biens mobiliers*) belonging to such agent: does the American government assume the right of depriving the American citizen of his *real right*, at the simple instance of the diplomatic agent relying upon his extra-territoriality?"

§ 236. Reply of United States.

This question was answered on the part of the American government, by assuming the instance contemplated by the Prussian government to be that of an *implied* contract, growing out of the relation of landlord and tenant, by which the former had secured to him, under the municipal laws of the country, a tacit *hypothek* or lien upon the furniture of the latter. It was taken for granted that there was no express hypothecation, still less any giving in *pledge*, which implies a transfer of possession by way of security for a debt.

This distinction was deemed important. There could be no doubt that, in this last case, the pawnee has a complete right, a *real right*, as it was called by the Prussian government, or *jus in re*, not in the least affected by diplomatic immunities. And accordingly, this was the course pointed out to creditors by Bynkershoek, who denies them all other means of satisfying themselves out of the minister's personal goods. Of course, these words were used with the proper restriction, which confines them to the *apparatus legationis*, or such as pass under the description of *legatus instructus et cum instrumento*.

With these distinctions and qualifications, the American government had no doubt that the view taken by its minister of this question of privilege was entirely correct. The sense of that government had been clearly expressed in the act of Congress, 1790, which includes the very case of distress for rent, among other legal remedies denied to the creditors of a foreign minister.

That this exemption was not peculiar to the statute law of this country, but was strictly *juris gentium*, appeared from the precedents mentioned by the great public jurist just cited

in his treatise *De Foro Legatorum*, the great canon of this branch of public law (*o*).

Besides this conclusive authority upon the very point in question, Bynkershoek states the principle (out of Grotius) that the personal goods of a foreign minister cannot be taken by way of distress or pledge, and gives it the sanction of his most emphatic assent (*p*). Indeed the whole scope of the treatise referred to, went to establish this very doctrine.

§ 237 But to consider it on principle. Three several questions would arise upon the inquiry propounded by the Prussian government. 1st. Is the landlord's right, in such a case, a *real right* properly so called? 2nd. Admitting it to be so, can it be asserted, consistently with Prussian municipal law, against a foreign minister who has not voluntarily parted with his possession, on an express contract, to secure payment of rent or damages? 3rd. Supposing the municipal law of Prussia to contemplate the case of a foreign minister, can that law be enforced, in such a case, consistently with the law of nations?

§ 238. There was, in all systems of jurisprudence, great difficulty in settling the legal category of the landlord's right. Pledge, although not property, is certainly a real right; but a mere lien or hypothek, in which there is no transfer of possession, is not a pledge. In England, and in the United States, the right of landlords was originally a mere lien, reducible by

(*o*) "Quia hæc (bona) considerantur ut personæ accessiones. . . . . Et secundum hæc Mornacius refert ad L. 2, § 3, *de Judic.* Regi Galliarum placuisse, anno 1608, *male pro locario Parisiis Venetæ reipublicæ legati mobilia fuisse retenta; et constanter ita usu est servatum deinceps ubique gentium.* Sed forte, dices, id nimium esse, quia ea mobilium detentio non tam fit ex causâ personæ, quàm *jure in re, quod locatori competit in invectis et illatis, quodque jus, lege quæsitum, legatis auferre non possit.* Sed tantum abest, ut nimium dicamus, ut vel bona quorum meminit d. Edictum anni 1679, non aliter interpretemur, quàm *bona mobilia*, id est, *utensilia*, &c. Hæc utensilia nego, ex jure gentium, pignori esse, vel unquam fuisse, quin nec capi posse, vel ad ordiendum judicium, vel ad *servandum quod nobis debetur*, vel ad exsequendam rem judicatam. Et facilè assentior Grotio, si de *utensilibus* accipias, quæ ipse dixit, ea nempe pignoris causâ capi non posse, *nec per judiciorum ordinem, nec manu regia*, explosâ sic distinctione, quæ aliis olim, sed sine ratione, placuerat." *De For. Legat.* cap. ix.

Compare the catalogue of the personal goods so privileged, *id.* cap. xvi.

(*p*) "Bona quoque legati mobilia, et quæ proinde habentur personæ accessio, *pignoris causâ, aut ad solutionem debiti, capi non posse*, nec per judiciorum ordinem, nec, quod quidam volunt, manu regiâ, verius est: nam omnis coactio a legato abesse debet, tam quæ res ei necessarias, quàm quæ personam tangit, quo plena ei sit securitas." Bynkershoek, de For. Legat. cap. viii. Grotius, de Jur. Bel. ac Pac., lib. ii. cap. 18, § 19.

distress into a right of pledge. In Scotland the same right is sometimes called a right of property, and sometimes a mere hypothek, springing out of a tacit contract. Without pretending to determine precisely whether its origin ought to be referred to the one or the other principle, (neither perhaps being fully adequate to account for all its effects,) it is considered by the best writers as a right of hypothek, convertible by a certain legal process into a real right of pledge.

If this be a proper view of the subject, there was surely an end of the question: for the *process* of conversion is as much the exercise of jurisdiction, as the levying an execution; and the public minister is exempt from all jurisdiction whatever.

It was true that all hypothecations, or privileges upon property, are classed by some writers under the head of real rights, but this was by no means conclusive of the case under consideration. In a conflict of rights, this might entitle the privileged creditor, to *preference* in the distribution of an inadequate fund, but the question was, how was he to assert that preference? By means of judicial process? If so, he is without remedy against one not subject to the jurisdiction, except by open violence, which, of course, is not classed among rights. Accordingly, privileges, and liens by mere operation of law, are usually considered as matters of *remedy*, not of *right;* as belonging to the *lex fori*, not to the essence of the contract (*q*).

It might, therefore, be considered as doubtful, *à priori* whether, by the Prussian code, the right of the landlord is a real right, to the effect, at least, of putting it on the footing of property transferred by contract, for that was the argument.

§ 239. But suppose this to be the usual effect, by operation of law, of the contract between landlord and tenant, does it hold as against one not subject to the law; not amenable to the jurisdiction; not, in legal contemplation, residing within the country of the contract?

By the supposition, it was an *incident* in law of the relation between the landlord and his tenant, and it turns upon an *implied* contract. It was supposed that the tenant agreed

(*q*) Story, Conflict of Laws, §§ 423—456, 2nd ed.

to hire the house on the usual conditions; but one of them was, that if he failed to pay the rent, or indemnify for damages done to the premises, the landlord should have a remedy by distress. It was, therefore, inferred that it was not the law, or the judge, but the tenant himself, who had transferred, *quasi contractu*, this interest in his own property. But if this reasoning was correct, why should it not apply in the case of arrest and holding to bail? or in any case of attachment? The consent might as well be implied here as in favour of a landlord. Indeed, the same implication might as reasonably be extended to all laws whatever, and foreign ministers thus be held universally subject by contract to the municipal jurisdiction. The presumption implied in the contract under the law of the place, and binding on the parties subject to the jurisdiction, is repelled by the immunity and extraterritoriality of the public minister. He that enters into a contract with another knows, or ought to know, his condition. So says Ulpian, (l. 19, pref. de R. J.), and the landlord who lets his house to a foreign minister, waives his remedy under the law from which he knows that minister is exempt.

The American government was therefore inclined, in the absence of any authority to the contrary, to think that the Prussian municipal law, properly interpreted, did not, in fact, authorize any such pretension as that set up by the landlord, in the present instance.

But even supposing it did authorize the pretension, it ought no more to derogate from the established law of nations in this case, than in that of personal arrest. The authorities cited above seemed to the American government entirely conclusive as to this point; and it was greatly confirmed in this view of the subject by the act of Congress declaratory of the law of nations, and by the opinion of other governments. In short, all the reasons on which diplomatic immunities have been asserted, and are now universally allowed, seem just as applicable to the case of liens and hypothecations in favour of landlords, as to remedies of any other kind. Indeed, nothing could afford a better practical illustration of this than the attempt of the landlord in the present case, by means of his pretended lien, to force the minister to pay damages assessed

§ 240.

at his discretion, for an injury proved only by his own allegation (r).

§ 241. The Prussian government declared, that its opinion upon the point in controversy remained unchanged by the above reasoning, and the authorities adduced in support of it. According to its view, the question was not whether the lessor had a right to retain a portion of the effects belonging to the lessee, and found on the premises at the expiration of the contract, as security for the damages incurred by its breach; but whether the lessor, by exerting his right of retention, had committed a violation of the privileges of diplomatic agents, or, at least, a punishable act; and if, for this reason, he could be compelled, summarily, and before the competent judge had pronounced upon his claim, to restore the effects thus retained. This last question being resolved negatively, the decision of the first must necessarily be reserved to the competent tribunals.

The privilege of extraterritoriality consists in the right of the diplomatic agent to be exempt from all dependence on the sovereign power of the country, near the government of which he is accredited. It follows, that the State cannot exercise against him any act of jurisdiction whatsoever, and as by a natural consequence of this principle, the tribunals of the country have, in general, no right to take cognizance of controversies in which foreign ministers are concerned, neither are they authorized, in the particular case of a controversy arising out of a contract of hiring, to ordain the seizure of the effects of a public minister.

If, then, the privilege of extraterritoriality regards only the relations which subsist between the diplomatic agent and the sovereign power of the country where he resides, it is also evident that a violation of this privilege can only be committed by the public authorities of that country, and not by a private person. The legal relations of the subjects of the country are in no respect *directly* changed by the principle of extraterritoriality; it is only *indirectly* that this principle can operate upon those relations; so that in respect to citizens' controversies, the subject is not entitled to invoke the interposition of the authorities of his own country against the

(r) Mr. Legaré's Despatch to Mr. Wheaton, 9th June, 1843.

foreign minister upon whom he may have a claim for redress, and if he would commence a suit against him, he must resort to the tribunals of the minister's country. If, on the other hand, the subject can do himself justice, without having recourse to the authorities of his own country, his position in respect to the foreign minister is absolutely the same as if the controversy had arisen with one of his own fellow-citizens.

It was hardly necessary to observe that, in such a case, the party must keep within the limits of what is generally permitted. If he should resort to violence, he would render himself guilty of an infraction of the law, and would be punishable in the same manner as if the adverse party were an inhabitant of the country.

In the controversy now in question, no authority dependent on the Prussian government had participated, either directly or indirectly, in the seizure of the effects of the American minister; the proprietor of the house having retained them by his own proper act, there was then no violation of the privilege of extraterritoriality. There was no proof of any act of violence having been committed by him, and the mere act of retention could not be considered as an unlawful act.

On principle, every proprietor of a house, even where it is let to another person, remains in possession of his property. It follows, that the effects brought on to the premises by the tenant may be considered, in some respects, as in possession of the landlord. It is for this reason that the municipal law of Prussia, as well as that of most other European States, gives to the landlord a lien upon the goods of the tenant, as a security for the payment of the rent. The question how far this right, founded upon the positive law of a particular country, can be exerted against a foreign minister, may be dismissed from consideration; since the act of retention cannot be regarded as an unlawful and punishable act, and, in such a case, it belongs to the tribunals of justice to pronounce judgment upon the rights which the landlord may have acquired by the retention (s).

§ 242. Duties and taxes.

The person and personal effects of the minister are not

(s) Baron de Bulow's Letter to Mr. Wheaton, 5th July, 1844.
See an able review of the above controversy by M. Fœlix, the learned editor of the Revue du Droit Français et Etranger, tome ii. p. 31.

liable to taxation. He is exempt from the payment of duties on the importation of articles for his own personal use and that of his family. But this latter exemption is, at present, by the usage of most nations, limited to a fixed sum during the continuance of the mission. He is liable to the payment of tolls and postages. The hotel in which he resides, though exempt from the quartering of troops, is subject to taxation, in common with the other real property of the country, whether it belongs to him or to his government. And though, in general, his house is inviolable, and cannot be entered, without his permission, by police, custom-house, or excise officers, yet the abuse of this privilege, by which it was converted in some countries into an asylum for fugitives from justice, has caused it to be very much restrained by the recent usage of nations (*t*).

§ 243. Messengers and couriers.

The practice of nations has also extended the inviolability of public ministers to the messengers and couriers, sent with despatches to or from the legations established in different countries. They are exempt from every species of visitation and search, in passing through the territories of those powers with whom their own government is in amity. For the purpose of giving effect to this exemption, they must be provided with passports from their own government, attesting their official character; and, in the case of despatches sent by sea, the vessel or *aviso* must also be provided with a commission or pass. In time of war, a special arrangement, by means of a cartel or flag of truce, furnished with passports, not only from their own government, but from its enemy, is necessary, for the purpose of securing these despatch vessels from interruption, as between the belligerent powers. But an ambassador, or other public minister, resident in a neutral country for the purpose of preserving the relations of peace and amity between the neutral State and his own government, has a right freely to send his despatches in a neutral vessel, which cannot lawfully be interrupted by the cruisers of a power at war with his own country (*u*).

(*t*) Vattel, liv. iv. ch. 9, §§ 117, 118. Martens, Précis, &c., liv. vii. ch. 5, § 220. Manuel Diplomatique, ch. 3, §§ 30, 31. Merlin, Répertoire. tit. *Ministre Publique*, sect. v. § 5, Nos. 2, 3.

(*u*) Vattel, liv. iv. ch. 9, § 123. Martens, Précis, &c., liv. vii. ch. 13, § 250. *The Caroline*, 6 C. Rob. 466.

§ 244. Public minister passing through the territory of another State than that to which he is accredited.

The opinion of public jurists appears to be somewhat divided upon the question of the respect and protection to which a public minister is entitled, in passing through the territories of a State other than that to which he is accredited. The inviolability of ambassadors, under the law of nations, is understood by Grotius and Bynkershoek, among others, as binding only on those to whom they are sent, and by whom they are received (*x*). Wicquefort, in particular, who has ever been considered as the stoutest champion of ambassadorial rights, asserts that the assassination of the ministers of the French king, Francis I., in the territories of the Emperor Charles V., though an atrocious murder, was no breach of the law of nations, as to the privileges of ambassadors. It might be regarded as a violation of the right of innocent passage, aggravated by the circumstance of the dignified character of the persons on whom the crime was committed,—and might even be considered a just cause of war against the emperor, without involving the question of protection in the character of ambassador, which arises exclusively from a legal presumption which can only exist between the sovereigns from and to whom he is sent (*y*).

§ 245. Opinion of Vattel.

Vattel, on the other hand, states that passports are necessary to an ambassador, in passing through different territories on his way to his destined post, in order to make known his public character. It is true that the sovereign to whom he is sent is more especially bound to cause to be respected the rights attached to that character; but he is not the less entitled to be treated, in the territory of a third power, with the respect due to the envoy of a friendly sovereign. He is, above all, entitled to enjoy complete personal security; to injure and insult him would be to injure and insult his sovereign and entire nation; to arrest him, or commit any other act of violence against his person, would be to infringe the rights of legation which belong to every sovereign. Francis I. was therefore fully justified in complaining of the assassination of his ambassadors, and, as Charles V. refused satisfaction, in declaring war against him.

(*x*) Grotius, de Jur. Bel. ac Pac. lib. ii. cap. 18, § 5. Bynkershoek, de Foro Comp. Legat. cap. ix. § 7.

(*y*) Wicquefort, de l'Ambassadeur, liv. i. § 29, pp. 433–439.

"If an innocent passage, with complete security, is due to a private individual, with still more reason is it due to the public minister of a sovereign, who is executing the orders of his master, and travelling on the business of his nation. I say *an innocent passage;* for if the journey of the minister is liable to just suspicion, as to its motives and objects; if the sovereign, through whose territories he is about to pass, has reason to apprehend that he may abuse the liberty of entering them for sinister purposes, he may refuse the passage. But he cannot maltreat him, or suffer others to maltreat him. If he has not sufficient reasons for refusing the passage, he may take such precautions as are necessary to prevent the privilege being abused by the minister" (*z*).

He afterwards limits this right of passage to the ambassadors of sovereigns, with whom the State through which the attempt to pass is, at the time, in the relations of peace and amity; and adduces, in support of this limitation of the right, the case of Marshal Belle-Isle, French ambassador at the Prussian court, in 1744, (France and Great Britain being then at war,) who, in attempting to pass through Hanover, was arrested and carried off a prisoner to England (*a*).

§ 246. Of Bynkershoek.

Bynkershoek maintains that ambassadors, passing through the territories of another State than that to which they are accredited, are amenable to the local jurisdiction, both civil and criminal, in the same manner with other aliens, who owe a temporary allegiance to the State. He interprets the edict of the States-General, of 1679, exempting from arrest "the persons, domestics, and effects of ambassadors, *hier te lande komende, residerende of passerende,*" as extending only to those public ministers actually accredited to their High Mightinesses. He considers the last-mentioned term *passerende* as referring not to those who, coming from abroad, merely pass through the territories of the State in order to proceed to another country, but to those only who are about to leave the State where they have been resident as ministers accredited to its government (*b*).

(*z*) Vattel, Droit des Gens, liv. iv. ch. 7, §§ 84, 85.
(*a*) Ch. de Martens, Causes Célèbres du Droit des Gens, tome i. p. 310.
(*b*) Bynkershoek, de For. Legat. cap. ix. Wheaton, Hist. Law of Nations, p. 243.

§ 247. Of Merlin.

This appears to Merlin to be a forced interpretation. "The word *passer* in French, and *passerende* in Dutch," says he, "was never used to designate a person returning from a given place; but is applicable to one who, having arrived at that place, does not stop there, but proceeds on to another. We must, therefore, conclude that the law in question attributes to ambassadors who merely pass through the United Provinces the same independence with those who are there resident. If it be objected, as Bynkershoek does object, that the States-General (that is, the authors of this very law) caused to be arrested, in 1717, the Baron de Gortz, ambassador of Sweden at the court of London, at the request of George I., against the security of whose crown he had been plotting, the answer to this example is furnished by Bynkershoek himself. 'The only reason,' says he, 'alleged by the States-General for this proceeding was, that this ambassador had not presented to them his letters of credence.' This reason (continues Merlin) is not the less conclusive for being the only one alleged by the States-General. When it is said that an ambassador is entitled, in the territories through which he merely passes, to the independence belonging to his public character, it must be understood with this qualification, that he travels *as an ambassador;* that is to say, after having caused himself to be announced as such, and having obtained permission to pass in that character. This permission places the sovereign, by whom it has been granted, under the same obligation as if the public minister had been accredited to and received by him. Without this permission, the ambassador must be considered as an ordinary traveller, and there is nothing to prevent his being arrested for the same causes which would justify the arrest of a private individual" (*c*).

To these observations of the learned and accurate Merlin it may be added, that the inviolability of a public minister in this case depends upon the same principle with that of his sovereign, coming into the territory of a friendly State by the permission, express or implied, of the local government. Both are equally entitled to the protection of that government, against every act of violence and every species of restraint, inconsistent with their sacred character. We have

(*c*) Merlin, Répertoire, tit. *Ministre Publique*, sect. v. § 3, Nos. 4, 12.

used the term *permission, express* or *implied;* because a public minister accredited to one country who enters the territory of another, making known his official character in the usual manner, is as much entitled to avail himself of the permission which is implied from the absence of any prohibition, as would be the sovereign himself in a similar case (*d*).

§ 248. Freedom of religious worship.

A minister resident in a foreign country is entitled to the privilege of religious worship in his own private chapel, according to the peculiar forms of his national faith, although it may not be generally tolerated by the laws of the State where he resides. Even since the epoch of the Reformation, this privilege has been secured, by convention or usage, between the Catholic and Protestant nations of Europe. It is also enjoyed by the public ministers and consuls from the Christian powers in Turkey and the Barbary States. The increasing spirit of religious freedom and liberality has gradually extended this privilege to the establishment, in most countries, of public chapels, attached to the different foreign embassies, in which not only foreigners of the same nation, but even natives of the country of the same religion, are allowed the free exercise of their peculiar worship. This does not, in general, extend to public processions, the use of bells, or other external rites celebrated beyond the walls of the chapel (*e*).

§ 249. Consuls not entitled to the peculiar privileges of public ministers.

Consuls are not public ministers. Whatever protection they may be entitled to in the discharge of their official duties, and whatever special privileges may be conferred upon them by the local laws and usages, or by international compact, they are not entitled, by the general laws of nations, to the peculiar immunities of ambassadors. No State is bound to permit the residence of foreign consuls, unless it has stipulated by convention to receive them. They are to be approved and admitted by the local sovereign, and, if guilty of illegal or improper conduct, are liable to have the exequatur, which is granted them, withdrawn, and may be punished by the laws of the State where they reside, or sent back to their own country, at the discretion of the Government which they have

(*d*) *Vide supra*, Pt. II. ch. 2, § 95.

(*e*) Vattel. liv. iv. ch. 7, § 104. Martens, Précis, &c., liv. vii. ch. 6, §§ 222—226. Klüber, Droit des Gens Moderne de l'Europe, Pt. II. tit. ii. ch. 3, §§ 215, 216.

offended. In civil and criminal cases, they are subject to the local law in the same manner with other foreign residents owing a temporary allegiance to the State (*f*).

§ 249a. Privileges of consuls.

Sir Robert Phillimore says that "The privileges of consuls, so far as they are derived from the country to which they are sent, are, generally speaking, an exemption from any *personal* tax, and generally from the liability to have soldiers *quartered* in their houses. They are usually allowed to grant passports to the subjects of their own country, living within the range of their consulate, but not to foreigners. As a general rule, the muniments and papers of the consulate are inviolable, and under no pretext to be seized or examined by the local authorities" (*g*). There have been numerous judicial decisions on this subject. The general result of the English, American, and French cases establishes that consuls have certain privileges, but that they are not diplomatic officers, and that they cannot claim any of the immunities accorded specially to members of the diplomatic service (*h*).

§ 249 b. Case of Mr. Bunch.

A remarkable case of the withdrawal of a consul's exequatur took place in America in 1861. In order to protect British commerce, Her Majesty's Government were desirous that the Confederates should observe the last three articles of the Declaration of Paris, and accordingly Mr. Bunch, the British Consul at Charleston, was instructed to communicate this desire of Her Majesty's Government to the Confederate authorities. The United States thereupon demanded that Mr. Bunch should be removed from his office, on the ground that the law of the United States forbad any person, not specially appointed, from counselling, advising, &c., in any political correspondence with the government of any foreign State, in relation to any disputes or controversies with the United States, and that Mr. Bunch ought to have known of this law, and to have communicated it to his government before obeying their instructions. It was also urged that the proper agents to make known the wishes of a foreign government were its diplomatic and not its consular officers. On these grounds Mr. Bunch's exequatur was withdrawn (*i*).

§ 250. Termination of public mission.

The mission of a foreign minister resident at a foreign court, or at a congress of ambassadors, may terminate during his life in one of the following modes:—

(*f*) Wicquefort, de l'Ambassadeur, liv. i. § 5. Bynkershoek, cap. 10. Martens, Précis, &c., liv. iv. ch. 3, § 148. Kent's Comment., vol. i. pp. 43—45, 5th ed. Fœlix, Droit Int. Privé, § 191.

(*g*) [Phillimore, vol. ii. § 248. Fynn, The British Consul Abroad, p. 17].

(*h*) [*Vivcash* v. *Becker*, 3 M. & S. 284; *Clark* v. *Cretico*, 1 Taunt. 186; *Aspinwall* v. *Queen's Proctor*, 2 Curteis, 241; *Sorensen* v. *Reg.* 11 Moo. P. C. 141; *The Octavie*, 38 L. J. Adm. 115; *Davis* v. *Packhard*, 7 Peters, 276; *St. Luke's Hospital* v. *Barkley*, 3 Blatchford, 259. Calvo, Droit Int. vol. ii. § 485].

(*i*) [Mr. Adams to Earl Russell, 21st Nov. 1861. U. S. Dipl. Cor., 1862, p. 1].

1. By the expiration of the period fixed for the duration of the mission; or, where the minister is constituted *ad interim* only, by the return of the ordinary minister to his post. In either of these cases, a formal recall is unnecessary.

2. When the object of the mission is fulfilled, as in the case of embassies of mere ceremony; or where the mission is special, and the object of the negotiation is attained or has failed.

3. By the recall of the minister.

4. By the decease or abdication of his own sovereign, or the sovereign to whom he is accredited. In either of these cases it is necessary that his letters of credence should be renewed; which, in the former instance, is sometimes done in the letter of notification written by the successor of the deceased sovereign to the foreign prince at whose court the minister resides. In the latter case he is provided with new letters of credence; but where there is reason to believe that the mission will be suspended for a short time only, a negotiation already commenced may be continued with the same minister confidentially *sub spe rati*.

5. When the minister, on account of any violation of the law of nations, or any important incident in the course of his negotiation, assumes on himself the responsibility of declaring his mission terminated.

6. When, on account of the minister's misconduct or the measures of his government, the court at which he resides thinks fit to send him away without waiting for his recall.

7. By a change in the diplomatic rank of the minister.

When, by any of the circumstances above mentioned, the minister is suspended from his functions, and in whatever manner his mission is terminated, he still remains entitled to all the privileges of his public character until his return to his own country (*k*).

§ 251. Letter of recall.

A formal letter of recall must be sent to the minister by his government: 1. Where the object of his mission has been accomplished, or has failed. 2. Where he is recalled from motives which do not affect the friendly relations of the two governments.

(*k*) Martens, Manuel Diplomatique, ch. 7, § 59; ch. 2, § 15. Précis, &c., liv. vii. ch. 9, § 232. Vattel, liv. iv. ch. 9, § 126.

In these two cases, nearly the same formalities are observed as on the arrival of the minister. He delivers a copy of his letter of recall to the minister of foreign affairs, and asks an audience of the sovereign, for the purpose of taking leave. At this audience the minister delivers the original of his letter of recall to the sovereign, with a complimentary address adapted to the occasion.

If the minister is recalled on account of a misunderstanding between the two governments, the peculiar circumstances of the case must determine whether a formal letter of recall is to be sent to him, or whether he may quit the residence without waiting for it; whether the minister is to demand, and whether the sovereign is to grant him, an audience of leave.

Where the diplomatic rank of the minister is raised or lowered, as where an envoy becomes an ambassador, or an ambassador has fulfilled his functions as such, and is to remain as a minister of the second or third class, he presents his letter of recall, and a letter of credence in his new character.

Where the mission is terminated by the death of the minister, his body is to be decently interred, or it may be sent home for interment; but the external religious ceremonies to be observed on this occasion depend upon the laws and usages of the place. The secretary of legation, or, if there be no secretary, the minister of some allied power, is to place the seals upon his effects, and the local authorities have no right to interfere, unless in case of necessity. All questions respecting the succession *ab intestato* to the minister's movable property, or the validity of his testament, are to be determined by the laws of his own country. His effects may be removed from the country where he resided, without the payment of any *droit d'aubaine* or *détraction*.

Although in strictness the personal privileges of the minister expire with the termination of his mission by death, the custom of nations entitles the widow and family of the deceased minister, together with their domestics, to a continuance, for a limited period, of the same immunities which they enjoyed during his lifetime.

It is the usage of certain courts to give presents to foreign ministers on their recall, and on other special occasions. Some governments prohibit their ministers from receiving such presents. Such was formerly the rule observed by the Venetian Republic, and such is now the law of the United States (*l*).

(*l*) Martens, Précis, &c., liv. vii. ch. 10, §§ 240—245. Manuel Diplomatique, ch. 7, §§ 60—65.

CHAPTER II.

RIGHTS OF NEGOTIATION AND TREATIES.

§ 252. Faculty of contracting by treaty, how limited or modified.

THE power of negotiating and contracting public treaties between nation and nation exists in full vigour in every sovereign State which has not parted with this portion of its sovereignty, or agreed to modify its exercise by compact with other States.

Semi-sovereign or dependent States have, in general, only a limited faculty of contracting in this manner; and even sovereign and independent States may restrain or modify this faculty by treaties of alliance or confederation with others. Thus the several States of the North American Union are expressly prohibited from entering into any treaty with foreign powers, or with each other, without the consent of the Congress; whilst the sovereign members of the Germanic Confederation formerly retained the power of concluding treaties of alliance and commerce, not inconsistent with the fundamental laws of the Confederation (*a*).

The constitution or fundamental law of every particular State must determine in whom is vested the power of negotiating and contracting treaties with foreign powers. In absolute, and even in constitutional monarchies, it is usually vested in the reigning sovereign. In republics, the chief magistrate, senate, or executive council is intrusted with the exercise of this sovereign power.

§ 253. Form of treaty.

No particular form of words is essential to the conclusion and validity of a binding compact between nations. The mutual consent of the contracting parties may be given expressly or tacitly; and in the first case, either verbally or in writing. It may be expressed by an instrument signed by the plenipotentiaries of both parties, or by a declaration, and

(*a*) See Pt. I. ch. 2, § 47, *et seq.*

counter declaration, or in the form of letters or notes exchanged between them. But modern usage requires that verbal agreements should be, as soon as possible, reduced to writing in order to avoid disputes; and all mere verbal communications preceding the final signature of a written convention are considered as merged in the instrument itself. The consent of the parties may be given tacitly, in the case of an agreement made under an imperfect authority, by acting under it as if duly concluded (*b*).

§ 254. Cartels, trucos, and capitulations.

There are certain compacts between nations which are concluded, not in virtue of any special authority, but in the exercise of a general implied power confided to certain public agents, as incidental to their official stations. Such are the official acts of generals and admirals, suspending or limiting the exercise of hostilities within the sphere of their respective military or naval commands, by means of special licenses to trade, of cartels for the exchange of prisoners, of truces for the suspension of arms, or capitulations for the surrender of a fortress, city, or province. These conventions do not, in general, require the ratification of the supreme power of the State, unless such a ratification be expressly reserved in the act itself (*c*).

§ 255. Sponsions.

Such acts or engagements, when made without authority, or exceeding the limits of the authority under which they purport to be made, are called *sponsions*. These conventions must be confirmed by express or tacit ratification. The former is given in positive terms, and with the usual forms; the latter is implied from the fact of acting under the agreement as if bound by its stipulations. Mere silence is not sufficient to infer a ratification by either party, though good faith requires that the party refusing it should notify its de-

(*b*) Martens, Précis, liv. ii. ch. 2, §§ 49, 51, 65. Heffter, § 87.

The Roman civilians arranged all international contracts into three classes. 1. Pactiones. 2. Sponsiones. 3. Fœdera. The latter were considered the most solemn; and Gaius, in the recently discovered fragments of his Institutes, speaking of the supposition of a treaty of peace concluded in the simple form of a mere *pactio*, says: "Dicitur uno casu hoc verbo (Spondesne? Spondeo.) peregrinum quoque obligari posse, velut si Imperator noster Principem alicujus peregrini populi de pace ita interroget: Pacem futuram spondes? vel ipse eodem modo interrogetur, quod nimium subtiliter dictum est; quia si quid adversus pactionem fiat, non ex stipulatu agitur, sed jure belli res vindicatur." (Comm. iii. § 94.)

(*c*) Grotius, de Jur. Bel. ac Pac. lib. iii. cap. 22, §§ 6—8. Vattel, Droit des Gens, liv. ii. ch. 14, § 207.

termination to the other party, in order to prevent the latter from carrying its own part of the agreement into effect. If, however, it has been totally or partially executed by either party, acting in good faith upon the supposition that the agent was duly authorised, the party thus acting is entitled to be indemnified or replaced in his former situation (*d*).

§ 256. Full power and ratification.

As to other public treaties: in order to enable a public minister or other diplomatic agent to conclude and sign a treaty with the government to which he is accredited, he must be furnished with a *full power*, independent of his general *letter of credence*.

§ 257. Opinions of Grotius and Puffendorf.

Grotius, and after him Puffendorf, consider treaties and conventions, thus negotiated and signed, as binding upon the sovereign in whose name they are concluded, in the same manner as any other contract made by a duly authorised agent binds his principal, according to the general rules of civil jurisprudence. Grotius makes a distinction between the procuration which is communicated to the other contracting party, and the instructions which are known only to the principal and his agent. According to him, the sovereign is bound by the acts of his ambassador, within the limits of his patent full-power, although the latter may have transcended or violated his secret instructions (*e*).

This opinion of the earlier public jurists, founded upon the analogies of the Roman law respecting the contract of mandate or commission, has been contested by more recent writers.

§ 258. Of Bynkershoek.

Bynkershoek lays down the true principles applicable to this subject, with that clearness and practical precision which distinguish the writings of that great public jurist. In the second book of his *Quæstiones Juris Publici* (cap. vii.), he propounds the question, whether the sovereign is bound by

(*d*) Grotius, de Jur. Bel. ac Pac. lib. ii. cap. 15, § 16; lib. iii. cap. 22, §§ 1—3. Vattel, Droit des Gens, liv. ii. ch. 14, §§ 209—212. Rutherforth's Inst. b. ii. ch. 9, § 21.

(*e*) "Et in generali præpositione accidere potest ut nos obliget qui præpositus est, agendo contra voluntatem nostram sibi soli significatum: quia hi distincti sunt actus volendi: unus, quo nos obligamus ratum habituros quicquid ille in tali negotiorum genere fecerit; alter, quo illum nobis obligamus, ut non agat nisi ex præscripto, sibi non aliis cognito. Quod notandum est ad ea quæ legati promittunt pro regibus ex vi instrumenti procuratorii, excedendo arcana mandata." Grotius de Jur. Bel. ac Pac. lib. ii. cap. xi. § 12. Puffendorf, de Jur. Naturæ et Gent. lib. iii. cap. ix. § 2.

the acts of his minister, contrary to his secret instructions. According to him, if the question were to be determined by the ordinary rules of private law, it is certain that the principal is not bound where the agent exceeds his powers. But in the case of an ambassador, we must distinguish between the general full-power which he exhibits to the sovereign to whom he is accredited, and his special instructions, which he may, and generally does retain, as a secret between his own sovereign and himself. He refers to the opinion of Albericus Gentilis (*de Jure Belli*, lib. iii. cap. xiv.), and that of Grotius above cited, that if the minister has not exceeded the authority given in his patent credentials, the sovereign is bound to ratify, although the minister may have deviated from his secret instructions. Bynkershoek admits that if the credentials are special, and describe the particulars of the authority conferred on the minister, the sovereign is bound to ratify whatever is concluded in pursuance of this authority. But the credentials given to plenipotentiaries are rarely special, still more rarely does the secret authority contradict the public full-power, and most rarely of all does a minister disregard his secret instructions (*f*). But what if he should disregard them? Is the sovereign bound to ratify in pursuance of the promise contained in the full-power? According to Bynkershoek, the usage of nations, at the time when he wrote, required a ratification by the sovereign to give validity to treaties concluded by his minister, in every instance, except in the very rare case where the entire instructions were contained in the patent full-power. He controverts the position of Wicquefort (*l'Ambassadeur et ses Fonctions*, liv. 2, § 15), condemning the conduct of those princes who had refused to ratify the acts of their ministers on the ground of their contravening secret instructions. The analogies of the Roman law, and the usages of the Roman people, were not to be considered as an unerring guide in this matter, since time had gradually worked a change in the usage of nations, which constitutes the law of nations; and Wicquefort himself, in another passage, had admitted the necessity of a ratification

(*f*) "Sed rarum est quod publica mandata sint specialia, rarius quod arcanum mandatum publico sit contrarium, rarissimum verò, quod legatus arcanum posterius spernat, et ex publico priori rem agat." Bynkershoek, Quæst. Jur. Pub. lib. ii. cap. vii.

to give validity to the acts of a minister under his full-power (*g*). Bynkershoek does not, however, deny that, if the minister has acted precisely in conformity with his patent full-power, which may be special, or his secret instructions, which are always special, even the sovereign is bound to ratify his acts, and subjects himself to the imputation of bad faith if he refuses. But if the minister exceed his authority, or undertake to treat points not contained in his full-power and instructions, the sovereign is fully justified in delaying, or even refusing his ratification. The peculiar circumstances of each particular case must determine whether the rule or the exception ought to be applied (*h*).

§ 259. Of Vattel.

Vattel considers the sovereign as bound by the acts of his minister, within the limits of his credentials, unless the power of ratifying be expressly reserved, according to the practice already established at the time when he wrote.

"Sovereigns treat with each other through the medium of their attorneys or agents, who are invested with sufficient powers for the purpose, and are commonly called plenipotentiaries. To their office we may apply all the rules of natural law which respect things done by commission. The rights of the agent are determined by the instructions that are given him. He must not deviate from them; but every promise which he makes, within the terms of his commission, and within the extent of his powers, binds his constituent.

(*g*) "Sed quod olim obtinuit, nunc non obtinet, ut mores gentium sæpe solent mutari, nam postquam ratihabitionem usus invaluit, inter gentes tantum non omnes receptum est, ne fœdera et pacta, a legatis inita, valerent nisi ea probaverint principes, quorum res agitur. Ipse Wicquefort (eodem Opere, l. 1, sect. 16), necessitatem ratihabitionum satis agnoscit hisce verbis: Que les pouvoirs, quelques amples et absolus qu'ils soient, aient toujours quelque relation aux ordres secrets qu'on leur donne, qui peuvent être changés et altérés, et qui le sont souvent, selon les conjonctures et les revolutions des affaires." Ibid.

(*h*) "Non tamen negaverim, si legatus publicum mandatum, quod forte speciale est, vel arcanum, quod semper est speciale, examussim sequutus, fœdera et pacta ineat, justi principis esse ea probare, et nisi probaverit, malæ fidei reum esse, simulque legatum ludibrio; sin autem mandatum excesserit, vel fœderibus et pactis nova quædam sint inserta, de quibus nihil mandatum erat, optimo jure poterit princeps vel differe ratihabitionem, vel plane negare. Secundum hæc damnaverim vel probaverim negatas ratihabitiones, de quibus prolixè agit Wicquefort (d. L. ii. sect. 15). In singulis causis, quas ipse ibi recenset, ego nolim judex sedere, nam plurimum facti habent, quod me latet, et forte ipsum latuit. Non immeritò autem nunc gentibus placuit ratihabitio, cùm mandata publica, ut modo dicebam vix unquam sint specialia, et arcana legatus in scriniis suis servare solent, neque adeo de his quicquam rescire possint, quibuscum actum est." Ibid.

"At present, in order to avoid all danger and difficulty, princes reserve to themselves the power of ratifying what has been concluded in their name by their ministers. The full-power is but a procuration *cum libera*. If this procuration were to have its full effect, they could not be too circumspect in giving it. But as princes cannot be compelled to fulfil their engagements, otherwise than by force of arms, it is customary to place no dependence on their treaties, until they have agreed to and ratified them. Thus, as every agreement made by the minister remains invalid until sanctioned by the ratification of the prince, there is less danger in giving the minister a full power. But before a sovereign can honourably refuse to ratify that which has been concluded in virtue of a full power, he must have strong and solid reasons, and, in particular, he must show that his minister has deviated from his instructions" (*i*).

The slightest reflection will show how wide is the difference between the power given by sovereigns to their ministers to negotiate treaties respecting vast and complicated international concerns, and that given by an individual to his agent or attorney to contract with another in his name respecting mere private affairs. The acts of public ministers under such full powers have been considered from very early times as subject to ratification (*k*).

§ 260. Of Sir R. Adair.

The reason on which this practice is founded is clearly explained by a veteran diplomat, whose long experience gives additional weight to his authority. "The forms in which one State negotiates with another," says Sir Robert Adair, "requiring, for the sake of the business itself, that the powers to transact it should be as extensive and general as words can

(*i*) Vattel, Droit des Gens, liv. ii. ch. 12, § 156.

(*k*) One of the earliest recorded examples of this practice was given in the treaty of peace concluded, in 561, by the Roman Emperor Justinian, with Cosroes I., King of Persia. Both the preliminaries and the definitive treaty, signed by the respective plenipotentiaries, were subsequently ratified by the two monarchs, and the ratifications formally exchanged. Barbeyrac, Histoire des anciens traités, partie ii. p. 295.

It has been very justly observed that this example of the exchange of formal ratifications, at a period of the world like that of Justinian, which invented nothing, but only collected and followed the precedents of the preceding ages, is conclusive to show that this sanction was then deemed necessary by the general usage of nations to give validity to treaties concluded under full powers. Wurm, Die Ratification von Staatsvertragen, Deutsche Vierteljahrs-Schrift, Nr. 29.

render them, it is usual so to draw them up, even to a promise to ratify; although in practice, the non-ratification of preliminaries is never considered to be a contravention of the law of nations. The reason is plain. A plenipotentiary, to obtain credit with a State on an equality with his master, must be invested with powers to do, and agree to, all that could be done and agreed to by his master himself, even to the alienating the best part of his territories. But the exercise of these vast powers, always under the understood control of non-ratification, is regulated by his instructions" (*l*).

§ 261. Of Kluber.

The exposition of the approved practice of nations, from which alone the law of nations applicable to this matter can be deduced, conclusively shows that a full power, however general, and even extending to a promise to ratify, does not involve the obligation of ratifying in a case where the plenipotentiary has deviated from his instructions. Yet the contrary doctrine inferred, as we have seen, by the earlier public jurists, from the analogies of private law in respect to the obligation of contracts, concluded by procuration, is countenanced by a modern writer of no inconsiderable merit. Kluber asserts that "public treaties can only be concluded in a valid manner by the ruler of the State, who represents it towards foreign nations, either immediately by himself, or through the agency of plenipotentiaries, and in a manner conformable to the constitutional laws of the State. A treaty concluded by such a plenipotentiary is valid, provided he has not transcended his patent full power; and a subsequent ratification is only required in the case where it is expressly reserved in the full power, or stipulated in the treaty itself, as is usually the case at present in all those conventions which are not, such as military arrangements are, of urgent necessity. The ratification by one of the contracting parties does not bind the other party to give his in return. Except in the case of special stipulations, a treaty is deemed to take effect from the time of the signature, and not from that of the ratification. A simple sponsion, an engagement entered into for the State, whether made by the representative of the State or his agent, unless he has full authority for making it, is not binding,

(*l*) Adair, Mission to the Court of Vienna, p. 54.

except so far as it is ratified by the State. The question whether a treaty, made in the name of the State, by the chief of the government with the enemy, while the former is a prisoner of war, is binding on the State, or whether it is to be regarded even as a sponsion, has given rise to serious disputes" (*m*).

§ 262. Of Martens.

Martens concurs with Klüber so far as to admit, that what he calls the universal law of nations, "does not require a special ratification to render obligatory the engagement of a minister acting within the limits of his full power, on the faith of which the other contracting party has entered into negotiation with him, even if the minister has transcended his secret instructions." But he very correctly adds, that "the positive law of nations, considering the necessity of giving to negotiators very extensive full powers, has required a special ratification so as not to expose the State to the irreparable injury which the inadvertence or bad faith of a subordinate authority might occasion it; so that treaties are only relied on when ratified. But the reason of this usage, which may be traced back to the remotest time, sufficiently shows, that if one of the two parties duly offers his ratification, the other party cannot refuse his in return, except so far as his agent may have transcended the limits of his instructions, and consequently is liable to punishment; and that, at least regularly, it does not depend upon the unlimited discretion of one nation to refuse its ratification by alleging mere reasons of convenience" (*n*).

Martens remarks, in a note to the third edition of his work, published after Kluber's had appeared, that the latter is of a contrary opinion, as to the obligation of one party to exchange ratifications when proposed by the other; "and as he (Kluber) considers the ratification as necessary only where it is reserved in the full power, or in the treaty itself (which is at present rarely omitted), it seems that this author deduces from this reservation the right of arbitrarily refusing the ratification, *which I doubt*" (*o*).

This observation of Martens appears to be founded on a misapprehension of the meaning of Kluber, into which we

(*m*) Kluber, Droit des Gens Moderne de l'Europe, § 142.
(*n*) Martens, Précis, &c., § 48.
(*o*) Martens, 3rd edit. Note f.

had ourselves inadvertently fallen, in the first edition of this work. Although he has not, perhaps, guarded his meaning with sufficient caution, further examination has convinced us that neither Klüber, nor any other institutional writer, has laid down so lax a principle, as that the ratification of a treaty, concluded in conformity with a full power, may be refused at the mere caprice of one of the contracting parties, and without assigning strong and solid reasons for such refusal.

The expressions used by Vattel, that "before a sovereign can honourably refuse to ratify that which has been concluded in virtue of a full power, he must have strong and solid reasons, and in particular, he must show that his minister has deviated from his instructions," may seem to imply that he considered such deviation as a necessary ingredient in the strong and solid reasons to be alleged for refusing to ratify. But several classes of cases may be enumerated, in which, it is conceived, such refusal might be justified, even where the minister had not transcended or violated his instructions. Among these the following may be mentioned:—

§ 263. Justification of refusal to ratify.

1. Treaties may be avoided, even subsequent to ratification, upon the ground of the impossibility, physical or moral, of fulfilling their stipulations. Physical impossibility is where the party making the stipulation is disabled from fulfilling it for want of the necessary physical means depending on himself. Moral impossibility is where the execution of the engagement would affect injuriously the rights of third parties. It follows, in both cases, that if the impossibility of fulfilling the treaty arises, or is discovered previous to the exchange of ratifications, it may be refused on this ground.

2. Upon the ground of mutual error in the parties respecting a matter of fact, which, had it been known in its true circumstances, would have prevented the conclusion of the treaty. Here, also, if the error be discovered previous to the ratification, it may be withheld upon this ground.

3. In case of a change of circumstances, on which the validity of the treaty is made to depend, either by an express stipulation (*clausula rebus sic stantibus*), or by the nature of the treaty itself. As such a change of circumstances would avoid the treaty, even after ratification, so if it take place

previous to the ratification, it will afford a strong and solid reason for withholding that sanction.

§ 264. When treaties begin to bind.

Every treaty is binding on the contracting parties from the date of its signature, unless it contain an express stipulation to the contrary. The exchange of ratifications has a retroactive effect, confirming the treaty from its date (*p*).

The recent interference of four of the great European powers in the internal affairs of the Ottoman Empire, affords a remarkable example of a treaty concluded by plenipotentiaries, which was not only held to be completely binding between the contracting parties, but the execution of which was actually commenced before the exchange of ratifications. Such was the case with the Convention of the 15th July, 1840, between Austria, Great Britain, Prussia, Russia, and Turkey. In the secret protocol annexed to the treaty, it was stated that, on account of the distance which separated the respective courts from each other, the interests of humanity, and weighty considerations of European policy, the plenipotentiaries, in virtue of their full powers, had agreed that the preliminary measures should be immediately carried into execution, and without waiting for the exchange of ratifications, consenting formally by the present act, and with the assent of their courts, to the immediate execution of these measures."

This anomalous case may, at first sight, seem to contradict the principles above stated, as to the necessity of a previous ratification, to give complete effect to a treaty concluded by plenipotentiaries. But further reflection will show the obvious distinction which exists between a declaration of the plenipotentiaries, authorized by the instructions of their respective courts, dispensing by mutual consent with the previous ratification; and a demand by one of the contracting parties, that the treaty should be carried into execution without waiting for the ratification of the other party (*q*).

§ 265. The treaty-making

The municipal constitution of every particular State determines in whom resides the authority to ratify treaties nego-

(*p*) Martens, Précis, &c., § 48. Essai concernant les Armateurs, &c., § 48. Klüber, Droit des Gens Moderne de l'Europe, § 48. Heffter, das Europaische Volkerrecht, § 87.

(*q*) Murhard, Nouveau Recueil Général, tome i. p. 163.

tiated and concluded with foreign powers, so as to render them obligatory upon the nation. In absolute monarchies, it is the prerogative of the sovereign himself to confirm the act of his plenipotentiary by his final sanction. In certain limited or constitutional monarchies, the consent of the legislative power of the nation is, in some cases, required for that purpose. In some republics, as in that of the United States of America, the advice and consent of the Senate are essential, to enable the chief executive magistrate to pledge the national faith in this form. In all these cases, it is, consequently, an implied condition in negotiating with foreign powers, that the treaties concluded by the executive government shall be subject to ratification in the manner prescribed by the fundamental laws of the State.

power dependent on the municipal constitution.

"He who contracts with another," says Ulpian, "knows, or ought to know, his condition." Qui cum alio contrahit, vel est, vel *debet* esse non ignarus conditionis ejus (l. 19, D. de div. R. J. 50, 17). But, in practice, the full powers given by the government of the United States to their plenipotentiaries always expressly reserve the ratification of the treaties concluded by them, by the President, with the advice and consent of the Senate.

§ 266. Auxiliary legislative measures, how far necessary to the validity of a treaty.

The treaty, when thus ratified, is obligatory upon the contracting States, independently of the auxiliary legislative measures, which may be necessary on the part of either, in order to carry it into complete effect. Where, indeed, such auxiliary legislation becomes necessary, in consequence of some limitation upon the treaty-making power, expressed in the fundamental laws of the State, or necessarily implied from the distribution of its constitutional powers,—such, for example, as a prohibition of alienating the national domain,—then the treaty may be considered as imperfect in its obligation, until the national assent has been given in the forms required by the municipal constitution. A general power to make treaties of peace necessarily implies a power to decide the terms on which they shall be made; and, among these, may properly be included the cession of the public territory and other property, as well as of private property included in the eminent domain annexed to the national sovereignty. If there be no limitation expressed in the fundamental laws of

the State, or necessarily implied from the distribution of its constitutional authorities on the treaty-making power in this respect, it necessarily extends to the alienation of public and private property, when deemed necessary or expedient (*r*).

Commercial treaties, which have the effect of altering the existing laws of trade and navigation of the contracting parties, may require the sanction of the legislative power in each State for their execution. Thus the commercial treaty of Utrecht, between France and Great Britain, by which the trade between the two countries was to be placed on the footing of reciprocity, was never carried into effect: The British Parliament having rejected the bill which was brought in for the purpose of modifying the existing laws of trade and navigation, so as to adapt them to the stipulations of the treaty (*s*). In treaties requiring the appropriation of moneys for their execution, it is the usual practice of the British government to stipulate that the king will recommend to parliament to make the grant necessary for that purpose. Under the Constitution of the United States, by which treaties made and ratified by the President, with the advice and consent of the Senate, are declared to be "the supreme law of the land," it seems to be understood that the Congress is bound to redeem the national faith thus pledged, and to pass the laws necessary to carry the treaty into effect (*t*).

§ 266a. Commencement of treaties.

The Supreme Court of the United States has laid down, as a principle of international law that, respecting the rights of either government under it, a treaty is considered concluded and binding from the date of its signature. In this regard the exchange of ratifications has, as stated in the text, a retroactive effect, confirming the treaty from its date. But a different rule prevails where the treaty operates on individual rights. The principle of relation does not apply to rights of this character, which were vested before the treaty was ratified. In so far as it affects them, it is not considered as concluded until there is an exchange of ratifications (*u*). The reason of the rule is this. In America a treaty is something more than a contract, for the Federal Constitution declares it to be the law of the land. If so, before it can become a law,

(*r*) Grotius, de Jur. Bel. ac Pac. lib. iii. cap. 20, § 7. Vattel, Droit des Gens, liv. i. ch. 20, § 244; ch. 2, §§ 262—265. Kent's Comment. on American Law, vol. i. p. 164, 5th ed.

(*s*) Lord Mahon's History of England from the Peace of Utrecht, vol. i. p. 24.

(*t*) Kent's Comment. vol. i. p. 285, 5th ed.

(*u*) [*U. S.* v. *Arredondo*, 6 Peters, 735].

the Senate, in whom rests the authority to ratify it, must agree to it. But the Senate are not required to adopt or reject it as a whole, but may modify or amend it. As the individual citizen on whose rights of property it operates has no means of knowing anything of it while before the Senate, it would be wrong in principle to hold him bound by it, as the law of the land, until it was ratified and proclaimed. And to construe the law, so as to make the ratification of the treaty relate back to its signing, thereby divesting a title already vested, would be manifestly unjust (*x*).

§ 267. Freedom of consent, how far necessary to the validity of treaties.

By the general *principles* of private jurisprudence, recognized by most, if not all, civilized countries, a contract obtained by violence is void. Freedom of consent is essential to the validity of every agreement, and contracts obtained under duress are void, because the general welfare of society requires that they should be so. If they were binding, the timid would constantly be forced by threats, or by violence, into a surrender of their just rights. The notoriety of the rule that such engagements are void, makes the attempt to extort them among the rarest of human crimes. On the other hand, the welfare of society requires that the engagements entered into by a nation under such duress as is implied by the defeat of its military forces, the distress of its people, and the occupation of its territories by an enemy, should be held binding; for if they were not, wars could only be terminated by the utter subjugation and ruin of the weaker party. Nor does inadequacy of consideration, or inequality in the conditions of a treaty between nations, such as might be sufficient to set aside a contract as between private individuals on the ground of gross inequality or enormous lesion, form a sufficient reason for refusing to execute the treaty (*y*).

268. Transitory conventions perpetual in their nature.

General compacts between nations may be divided into what are called *transitory conventions*, and *treaties* properly so termed. The first are perpetual in their nature, so that, being once carried into effect, they subsist independent of any change in the sovereignty and form of government of the contracting parties; and although their operation may, in

(*x*) [*Haver* v. *Yaker*, 9 Wallace, 34. See also, *U. S.* v. *Reynes*, 9 Howard, 148, 289; *Foster* v. *Neilson*, 2 Peters, 314].

(*y*) Senior, Edinburgh Rev. No. CLVI. art. 1. Martens, Précis, liv. ii. ch. 2, §§ 50, 52. Grotius, de Jur. Bel. ac Pac. lib. ii. sect. xiv. §§ 4—12.

some cases, be suspended during war, they revive on the return of peace without any express stipulation. Such are treaties of session, boundary, or exchange of territory, or those which create a permanent servitude in favour of one nation within the territory of another (*z*).

Thus the treaty of peace of 1783, between Great Britain and the United States, by which the independence of the latter was acknowledged, prohibited future confiscations of property; and the treaty of 1794, between the same parties, confirmed the titles of British subjects holding lands in the United States, and of American citizens holding lands in Great Britain, which might otherwise be forfeited for alienage. Under these stipulations, the Supreme Court of the United States determined that the title both of British natural subjects and of corporations to lands in America was protected by the treaty of peace, and confirmed by the treaty of 1794, so that it could not be forfeited by any intermediate legislative act, or other proceeding, for alienage. Even supposing the treaties were abrogated by the war which broke out between the two countries in 1812, it would not follow that the rights of property already vested under those treaties could be divested by supervening hostilities. The extinction of the treaties would no more extinguish the title to real property acquired or secured under their stipulations than the repeal of a municipal law affects rights of property vested under its provisions (*a*). But independent of this incontestable principle, on which the security of all property rests, the court was not inclined to admit the doctrine, that treaties become, by war between the two contracting parties, *ipso facto* extinguished, if not revived by an express or implied renewal on the return of peace. Whatever might be the latitude of doctrine laid down by elementary writers on the law of nations, dealing in general terms in relation to the subject, it was satisfied that the doctrine contended for was not universally true. There might be treaties of such a nature as to their object and import, as that war would necessarily put an end to them; but where treaties contemplated a permanent arrange-

(*z*) Vattel, Droit des Gens, liv. ii. ch. 12, § 192. Martens, Précis, &c., liv. ii. ch. 2, § 58.

(*a*) [*Chirac* v. *Chirac*, 2 Wheaton, 277].

ment of territory, and other national rights, or in their terms were meant to provide for the event of an intervening war, it would be against every principle of just interpretation to hold them extinguished by war. If such were the law, even the treaty of 1783, so far as it fixed the limits of the United States, and acknowledged their independence, would be gone, and they would have had again to struggle for both, upon original revolutionary principles. Such a construction was never asserted, and would be so monstrous as to supersede all reasoning. The court, therefore, concluded that treaties stipulating for permanent rights and general arrangements, and professing to aim at perpetuity, and to deal with the case of war as well as of peace, do not cease on the occurrence of war, but are, at most, only suspended while it lasts; and unless they are waived by the parties, or new and repugnant stipulations are made, revive upon the return of peace (*b*).

§ 269. Controversy between the American and British governments respecting the rights of fishery on the coasts of the British dominions in North America.

By the 3rd article of the treaty of peace of 1783, between the United States and Great Britain, it was "agreed that the people of the United States shall continue to enjoy unmolested the right to take fish of every kind on the Grand Bank, and on all the other Banks of Newfoundland; also in the Gulf of St. Lawrence, and at all other places in the sea, where the inhabitants of both countries used, at any time heretofore, to fish; and also that the inhabitants of the United States shall have liberty to take fish of every kind on such part of the coast of Newfoundland as British fishermen shall use (but not to dry or cure the same on that island), and also on the coasts, bays, and creeks of all other of his Britannic Majesty's dominions in America; and that the American fishermen shall have liberty to dry and cure fish in any of the unsettled bays, harbours, and creeks of Nova Scotia, Magdalen Islands, and Labrador, so long as the same shall remain unsettled; but so soon as the same, or either of them shall be settled, it shall not be lawful for the said fishermen to dry or cure fish at such settlement, without a

(*b*) *The Society for the Propagation of the Gospel in Foreign Parts* v. *The Town of New Haven*, 8 Wheaton, 464. The same principle was asserted by the English Court of Chancery, as to American citizens holding lands in Great Britain under the treaty of 1794, in *Sutton* v. *Sutton*, 1 Russell & Milne, 663.

previous agreement for that purpose with the inhabitants, proprietors, or possessors of the ground."

§ 270. Negotiation at Ghent.

During the negotiation at Ghent, in 1814, the British plenipotentiaries gave notice that their government "did not intend to grant to the United States, gratuitously, the privileges formerly granted by treaty to them of fishing within the limits of the British sovereignty, and of using the shores of the British territories for purposes connected with the British fisheries." In answer to this declaration the American plenipotentiaries stated that they were "not authorized to bring into discussion any of the rights or liberties which the United States have heretofore enjoyed in relation thereto; from their nature, and from the peculiar character of the treaty of 1783, by which they were recognized, no further stipulation has been deemed necessary by the government of the United States to entitle them to the full enjoyment of them all."

The treaty of peace concluded at Ghent, in 1814, therefore, contained no stipulation on the subject; and the British government subsequently expressed its intention to exclude the American fishing vessels from the liberty of fishing within one marine league of the shores of the British territories in North America, and from that of drying and curing their fish on the unsettled parts of those territories, and, with the consent of the inhabitants, within those parts which had become settled since the peace of 1783.

§ 271. Argument of Mr J. Q. Adams.

In discussing this question, the American minister in London, Mr. J. Q. Adams, stated, that from the time the settlement in North America, constituting the United States, was made, until their separation from Great Britain and their establishment as distinct sovereignties, these liberties of fishing, and of drying and curing fish, had been enjoyed by them, in common with the other subjects of the British empire. In point of principle, they were pre-eminently entitled to the enjoyment; and, in point of fact, they had enjoyed more of them than any other portion of the empire; their settlement of the neighbouring country having naturally led to the discovery and improvement of these fisheries; and their proximity to the places where they were prosecuted, having led them to the discovery of the most advantageous fishing

grounds, and given them facilities in the pursuit of their occupation in those regions, which the remoter parts of the empire could not possess. It might be added, that they had contributed their full share, and more than their share, in securing the conquest from France of the provinces on the coasts of which these fisheries were situated.

It was doubtless upon considerations such as these that an express stipulation was inserted in the treaty of 1783, recognizing the rights and liberties which had always been enjoyed by the people of the United States in these fisheries, and declaring that they should continue to enjoy the right of fishing on the Grand Bank, and other places of common jurisdiction, and have the liberty of fishing, and drying and curing their fish, within the exclusive British jurisdiction on the North American coasts, to which they had been accustomed whilst they formed a part of the British nation. This stipulation was a part of that treaty by which His Majesty acknowledged the United States as free, sovereign, and independent States, and that he treated with them as such.

It could not be necessary to prove that this treaty was not, in its general provisions, one of those which, by the common understanding and usage of civilized nations, is considered as annulled by a subsequent war between the same parties. To suppose that it is, would imply the inconsistency and absurdity of a sovereign and independent State, liable to forfeit its right of sovereignty by the act of exercising it on a declaration of war. But the very words of the treaty attested that the sovereignty and independence of the United States were not considered as grants from his Majesty. They were taken and expressed as existing before the treaty was made, and as then only first formally recognized by Great Britain.

Precisely of the same nature were the rights and liberties in the fisheries. They were, in no respect, grants from the King of Great Britain to the United States; but the acknowledgment of them as rights and liberties enjoyed before the separation of the two countries, and which it was mutually agreed should continue to be enjoyed under the new relations which were to subsist between them, constituted the essence of the article concerning the fisheries. The very peculiarity of the stipulation was an evidence that it was not, on either

side, understood or intended as a grant from one sovereign State to another. Had it been so understood, neither could the United States have claimed, nor would Great Britain have granted, gratuitously, any such concession. There was nothing, either in the state of things, or in the disposition of the parties, which could have led to such a stipulation on the part of Great Britain, as on the ground of a grant, without an equivalent.

If the stipulation by the treaty of 1783, was one of the conditions by which his Majesty acknowledged the sovereignty and independence of the United States; if it was the mere recognition of rights and liberties previously existing and enjoyed, it was neither a privilege gratuitously granted, nor liable to be forfeited by the mere existence of a subsequent war. If it was not forfeited by the war, neither could it be impaired by the declaration of Great Britain at Ghent, that she did not intend to renew the grant. Where there had been no gratuitous concession, there could be none to renew; the rights and liberties of the United States could not be cancelled by the declaration of the British intentions. Nothing could abrogate them but a renunciation by the United States themselves (*c*).

§ 272. Argument of Earl Bathurst.

In the answer of the British government to this communication, it was stated that Great Britain had always considered the liberty formerly enjoyed by the United States, of fishing within British limits and using British territory, as derived from the 3rd article of the Treaty of 1783, and from that alone; and that the claim of an independent State to occupy and use, at its discretion, any portion of the territory of another, without compensation or corresponding indulgence, could not rest on any other foundation than conventional stipulation. It was unnecessary to inquire into the motives which might have originally influenced Great Britain in conceding such liberties to the United States, or whether other articles of the treaty did or did not, in fact, afford an equivalent for them, because all the stipulations profess to be founded on reciprocal advantage and mutual convenience. If the United States derived from that treaty privileges, from

(*c*) Mr. J. Q. Adams to Lord Bathurst, Sept. 25, 1815. American State Papers, fol. edit. 1834, vol. iv. p. 352.

which other independent nations not admitted by treaty were excluded, the duration of the privileges must depend on the duration of the instrument by which they were granted; and if the war abrogated the treaty, it determined the privileges. It had been urged, indeed, on the part of the United States, that the Treaty of 1783 was of a peculiar character, and that, because it contained a recognition of American independence, it could not be abrogated by a subsequent war between the parties. To a position of this novel nature Great Britain could not accede. She knew of no exception to the rule, that all treaties are put an end to by a subsequent war between the same parties; she could not, therefore, consent to give her diplomatic relations with one State a different degree of permanency from that on which her connection with all other States depended. Nor could she consider any one State at liberty to assign to a treaty made with her such a peculiarity of character as should make it, as to duration, an exception to all other treaties, in order to found, on a peculiarity thus assumed, an irrevocable title to indulgences which had all the features of temporary concessions.

It was by no means unusual for treaties containing recognitions and acknowledgments of title, in the nature of perpetual obligation, to contain, likewise, grants of privileges liable to revocation. The Treaty of 1783, like many others, contained provisions of different character; some in their own nature irrevocable, the others merely temporary. If it were thence inferred that, because some advantages specified in that treaty would not be put an end to by the war, therefore all the other advantages were intended to be equally permanent, it must first be shown that the advantages themselves are of the same, or at least of a similar character; for the character of one advantage, recognized or conceded by treaty, can have no connection with the character of another, though conceded by the same instrument, unless it arises out of a strict and necessary connection between the advantages themselves. But what necessary connection could there be between a right to independence and a liberty to fish within British jurisdiction, or to use British territory? Liberties within British limits were as capable of being exercised by a dependent as by an independent State; and could not, therefore, be the necessary consequence of independence.

The independence of a State could not be correctly said to be granted by a treaty, but to be acknowledged by one. In the Treaty of 1783, the independence of the United States was certainly acknowledged, not merely by the consent to make the treaty, but by the previous consent to enter into the provisional articles, executed in 1782. Their independence might have been acknowledged, without either the treaty or the provisional articles; but by whatever mode acknowledged, the acknowledgment was, in its own nature, irrevocable. A power of revoking, or even of modifying it, would be destructive of the thing itself; and, therefore, all such power was necessarily renounced when the acknowledgment was made. The war could not put an end to it, for the reason justly assigned by the American minister; because a nation could not forfeit its sovereignty by the act of exercising it; and for the further reason that Great Britain, when she declared war against the United States, gave them, by that very act, a new recognition of their independence.

The *rights* acknowledged by the Treaty of 1783 were not only distinguishable from the *liberties* conceded by the same treaty, in the foundation on which they stand, but they were carefully distinguished in the wording of the treaty. In the 1st article, Great Britain acknowledged an independence already expressly recognized by the other powers of Europe, and by herself in her consent to enter into the provisional articles of 1782. In the 3rd article, Great Britain acknowledged the *right* of the United States to take fish on the Banks of Newfoundland and other places, from which Great Britain had no right to exclude any independent nation. But they were to have the *liberty* to cure and dry them in certain unsettled places within the British territory. If the liberties thus granted were to be as perpetual and indefeasible as the rights previously recognized, it was difficult to conceive that the American plenipotentiaries would have admitted a variation of language so adapted to produce a different impression; and, above all, that they should have admitted so strange a restriction of a perpetual and indefeasible right as that with which the article concludes, which left a right so practical and so beneficial as this was admitted to be, dependent on the will of British subjects, proprietors, or possessors of the soil, to prohibit its exercise altogether.

It was, therefore, surely obvious that the word *right* was, throughout the treaty, used as applicable to what the United States were to enjoy in virtue of a recognized independence; and the word *liberty* to what they were to enjoy as concessions strictly dependent on the treaty itself (*d*).

§ 273. Reply of Mr. Adams.

The American minister, in his reply to this argument, disavowed every pretence of claiming for the diplomatic relations between the United States and Great Britain a degree of permanency different from that of the same relations between either of the parties and all other powers. He disclaimed all pretence of assigning to any treaty between the two nations, any peculiarity not founded in the nature of the treaty itself. But he submitted to the candour of the British government whether the Treaty of 1783 was not, from the very nature of its subject-matter, and from the relations previously existing between the parties to it, peculiar? Whether it was a treaty which could have been made between Great Britain and any other nation? And if not, whether the whole scope and object of its stipulations were not expressly intended to establish a new and permanent state of diplomatic relations between the two countries, which would not and could not be annulled by the mere fact of a subsequent war? And he made this appeal with the more confidence, because the British note admitted that treaties often contained recognitions in the nature of perpetual obligation; and because it implicitly admitted that the whole Treaty of 1783 is of this character, with the exception of the article concerning the navigation of the Mississippi, and a small part of the article concerning the fisheries.

The position, that "Great Britain knows of no exception to the rule, that all treaties are put an end to by a subsequent war," appeared to the American minister not only novel, but unwarranted by any of the received authorities upon the law of nations; unsanctioned by the practice and usages of sovereign States; suited, in its tendency, to multiply the incitements to war, and to weaken the ties of peace between independent nations; and not easily reconciled with the admission that treaties not unusually contain, together with

(*d*) Earl Bathurst to Mr. J. Q. Adams, Oct. 30, 1815. American State Papers, fol. edit. 1834, vol. iv. p. 354.

articles of a temporary character, liable to revocation, "recognitions and acknowledgments in the nature of perpetual obligation."

A recognition or acknowledgment of title, stipulated by convention, was as much a part of the treaty as any other article; and if all treaties are abrogated by war, the recognitions and acknowledgments contained in them must necessarily be null and void, as much as any other part of the treaty.

If there were no exception to the rule, that war puts an end to all treaties between the parties to it, what could be the purpose or meaning of those articles which, in almost all treaties of commerce, were provided expressly for the contingency of war, and which during the peace are without operation? For example, the 10th article of the Treaty of 1794, between the United States and Great Britain, stipulated that "Neither the debts due from individuals of the one nation to individuals of the other, nor shares, nor moneys, which they may have in the public funds, or in the public or private banks, shall ever, *in any event of war*, or national differences, be sequestered or confiscated." If war put an end to all treaties, what could the parties to this engagement intend by making it formally an article of the treaty? According to the principle laid down, excluding all exception, by the British note, the moment a war broke out between the two countries this stipulation became a dead letter, and either State might have sequestered or confiscated those specified properties, without any violation of compact between the two nations.

The American minister believed that there were many exceptions to the rule by which the treaties between nations are mutually considered as terminated by the intervention of a war; that these exceptions extend to all engagements contracted with the understanding that they are to operate equally in war and peace, or exclusively during war; to all engagements by which the parties superadd the sanction of a formal compact to principles dictated by the eternal laws of morality and humanity; and, finally, to all engagements, which, according to the expression of the British note, are *in the nature of perpetual obligation.* To the

first and second of these classes might be referred the 10th article of the Treaty of 1794, and all treaties or articles of treaties stipulating the abolition of the slave-trade. The treaty of peace of 1783 belongs to the third class.

The reasoning of the British note seemed to confine this perpetuity of obligation to recognitions and acknowledgments of title, and to consider its perpetual nature as resulting from the subject-matter of the contract, and not from the engagement of the contractor. While Great Britain left the United States unmolested in the enjoyment of all the advantages, rights, and liberties stipulated in their behalf in the Treaty of 1783, it was immaterial whether she founded her conduct upon the mere fact that the United States are in possession of such rights, or whether she was governed by good faith and respect for her own engagements. But if she contested any of those rights, it was to her engagements only that the United States could appeal, as the rule for settling the question of right. If this appeal were rejected, it ceased to be a discussion of right; and this observation applied as strongly to the recognition of independence and the boundary line, in the Treaty of 1783, as to the fisheries. It was truly observed in the British note, that in that treaty the independence of the United States was not granted, but acknowledged; and it was added, that it might have been acknowledged without any treaty, and that the acknowledgment, in whatever mode, would have been irrevocable. But the independence of the United States was precisely the question upon which a previous war between them and Great Britain had been waged. Other nations might acknowledge their independence without a treaty, because they had no right or claim of right to contest it; but this acknowledgment, to be binding upon Great Britain, could have been made only by treaty, because it included the dissolution of one social compact between the parties, as well as the formation of another. Peace could exist between the two nations only by the mutual pledge of faith to the new social relations established between them; and hence it was, that the stipulations to that treaty were in the nature of perpetual obligation, and not liable to be forfeited by a subsequent war, or by any declaration

of the will of either party, without the assent of the other (*e*).

§ 274. Result of this correspondence.

The above analysis of the correspondence which took place relating to this subject, has been inserted as illustrative of the general question, how far treaties are abrogated by war between the parties to them; but the particular controversy itself was finally settled between the two countries on the basis of compromise, by the convention of 1818, in which the liberty claimed by the United States in respect to the fishery within the British jurisdiction and territory, was confined to certain geographical limits (*f*).

§ 275. Treaties, the operation of which cease in certain cases.

Treaties, properly so called, or *fœdera*, are those of friendship and alliance, commerce, and navigation, which, even if perpetual in terms, expire of course:—

1. In case either of the contracting parties loses its existence as an independent State.

2. Where the internal constitution of government of either State is so changed, as to render the treaty inapplicable under circumstances different from those with a view to which it was concluded.

Here the distinction laid down by institutional writers between *real* and *personal* treaties becomes important. The first bind the contracting parties independently of any change in the sovereignty, or in the rulers of the State. The latter include only treaties of mere personal alliance, such as are expressly made with a view to the person of the actual ruler or reigning sovereign, and though they bind the State during his existence, expire with his natural life or his public connection with the State (*g*).

3. In case of war between the contracting parties; unless such stipulations as are made expressly with a view to a rupture, such as the period of time allowed to the respective subjects to retire with their effects, or other limitations of the general rights of war. Such is the stipulation contained in the 10th article of the Treaty of 1794, between Great Britain and the United States,—providing that private debts and

(*e*) Mr. J. Q. Adams to Lord Castlereagh, Jan. 22, 1816. American State Papers, fol. edit. 1834, vol. iv. p. 356.
(*f*) *Vide ante*, pt. ii. ch. iv. § 180.
(*g*) *Vide ante*, pt. i. ch. 2, § 29.

shares or moneys in the public funds, or in public or private banks belonging to private individuals, should never, in the event of war, be sequestered or confiscated. There can be no doubt that the obligation of this article would not be impaired by a supervening war, being the very contingency meant to be provided for, and that it must remain in full force until mutually agreed to be rescinded (*h*).

4. Treaties expire by their own limitation, unless revived by express agreement, or when their stipulations are fulfilled by the respective parties, or when a total change of circumstances renders them no longer obligatory.

§ 276. Treaties revived and confirmed on the renewal of peace.

Most international compacts, and especially treaties of peace, are of a mixed character, and contain articles of both kinds, which renders it frequently difficult to distinguish between those stipulations which are perpetual in their nature, and such as are extinguished by war between the contracting parties, or by such changes of circumstances as affect the being of either party, and thus render the compact inapplicable to the new condition of things. It is for this reason, and from abundance of caution, that stipulations are frequently inserted in treaties of peace, expressly reviving and confirming the treaties formerly subsisting between the contracting parties, and containing stipulations of a permanent character, or in some other mode excluding the conclusion that the obligation of such antecedent treaties is meant to be waived by either party. The reiterated confirmations of the treaties of Westphalia and Utrecht, in almost every subsequent treaty of peace or commerce between the same parties, constituted a sort of written code of conventional law, by which the distribution of power and territory among the principal European States was permanently settled, until violently disturbed by the partition of Poland and the wars of the French revolution. The arrangements of territory and political relations substituted by the treaties of Vienna for the ancient conventional law of Europe, and doubtless intended to be of a similar permanent character, have already undergone, in consequence of the French, Polish, and Belgic revolutions of 1830, very im-

(*h*) Vattel, liv. iii. ch. 10, § 175. Kent's Comment. on American Law, vol. i. p. 175, 5th ed.

portant modifications, of which we have given an account in another work (*i*).

§ 277. Treaties of guaranty.

The convention of guaranty is one of the most usual international contracts. It is an engagement by which one State promises to aid another where it is interrupted, or threatened to be disturbed, in the peaceable enjoyment of its rights by a third power. It may be applied to every species of right and obligation that can exist between nations; to the possession and boundaries of territories, the sovereignty of the State, its constitution of government, the right of succession, &c.; but it is most commonly applied to treaties of peace. The guaranty may also be contained in a distinct and separate convention, or included among the stipulations annexed to the principal treaty intended to be guaranteed. It then becomes an accessory obligation (*k*).

The guaranty may be stipulated by a third power not a party to the principal treaty, by one of the contracting parties in favour of another, or mutually between all the parties. Thus, by the treaty of peace concluded at Aix-la-Chapelle in 1748, the eight high contracting parties mutually guaranteed to each other all the stipulations of the treaty.

The guaranteeing party is bound to nothing more than to render the assistance stipulated. If it prove insufficient, he is not obliged to indemnify the power to whom his aid has been promised. Nor is he bound to interfere to the prejudice of the just rights of a third party, or in violation of a previous treaty rendering the guaranty inapplicable in a particular case. Guaranties apply only to rights and possessions existing at the time they are stipulated. It was upon these grounds that Louis XV. declared, in 1741, in favour of the Elector of Bavaria against Maria Theresa, the heiress of the Emperor Charles VI., although the court of France had previously guaranteed the pragmatic sanction of that Emperor, regulating the succession to his hereditary States. And it was upon similar grounds, that France refused to fulfil the Treaty of Alliance of 1756 with Austria, in respect to the

(*i*) Wheaton, Hist. Law of Nations, pp. 435—445, 538—551.

(*k*) Vattel, Droit des Gens, liv. ii. ch. 16, §§ 235—239. Klüber, Droit des Gens Moderne de l'Europe, pt. ii. tit. 2, sect. 1, ch. 2, §§ 157, 158. Martens, Précis, &c., § 63.

pretensions of the latter power upon Bavaria, in 1778, which threatened to produce a war with Russia. Whatever doubts may be suggested as to the application of these principles to the above cases, there can be none respecting the principles themselves, which are recognized by all the text writers (*l*).

These writers make a distinction between a *surety* and a *guarantee*. Thus Vattel lays it down, that where the matter relates to things which another may do or give as well as he who makes the original promise, as, for instance, the payment of a sum of money, it is safer to demand a *surety* (caution) than a *guarantee* (garant). For the surety is bound to make good the promise in default of the principal; whereas the guarantee is only obliged to use his best endeavours to obtain a performance of the promise from him who has made it (*m*).

§ 278. Treaties of alliance.

Treaties of alliance may be either defensive or offensive. In the first case, the engagements of the ally extend only to a war really and truly defensive; to a war of aggression first commenced, in point of fact, against the other contracting party. In the second, the ally engages generally to co-operate in hostilities against a specified power, or against any power with whom the other party may be engaged in war.

An alliance may also be both offensive and defensive.

§ 279. Distinction between general alliance and treaties of limited succour and subsidy.

General alliances are to be distinguished from treaties of limited succour and subsidy. Where one State stipulates to furnish to another a limited succour of troops, ships of war, money, or provisions, without any promise looking to an eventual engagement in general hostilities, such a treaty does not necessarily render the party furnishing this limited succour, the enemy of the opposite belligerent. It only becomes such, so far as respects the auxiliary forces thus supplied; in all other respects it remains neutral. Such, for example, have long been the accustomed relations of the confederated Cantons of Switzerland with the other European powers (*n*).

(*l*) Vattel, liv. ii. ch. 16, § 238. Flassan, Histoire de la Diplomatie Française, tom. vii. p. 195.

(*m*) Vattel, § 239. [See Hertslet, Map of Europe by Treaty, Index, tit. Guaranty].

(*n*) Vattel, Droit des Gens, liv. iii. ch. 6, §§ 79—82.

§ 280. *Casus fœderis* of a defensive alliance.

Grotius, and the other text writers, hold that the *casus fœderis* of a defensive alliance does not apply to the case of a war manifestly unjust, that is, to a war of aggression on the part of the power claiming the benefit of the alliance. And it is even said to be a tacit condition annexed to every treaty made in time of peace, stipulating to afford succour in time of war, that the stipulation is applicable only to a just war. To promise assistance in an unjust war would be an obligation to commit injustice, and no such contract is valid. But, it is added, this tacit restriction in the terms of a general alliance can be applied only to a manifest case of unjust aggression on the part of the other contracting party, and cannot be used as a pretext to elude the performance of a positive and unequivocal engagement, without justly exposing the ally to the imputation of bad faith. In doubtful cases, the presumption ought rather to be in favour of our confederate, and of the justice of his quarrel (*o*).

The application of these general principles must depend upon the nature and terms of the particular guaranties contained in the treaty in question. This will best be illustrated by specific examples.

§ 281. Alliance between Great Britain and Holland.

Thus, the States-General of Holland were engaged, previously to the war of 1756, between France and Great Britain, in three different guaranties and defensive treaties with the latter power. The first was the original defensive alliance, forming the basis of all the subsequent compacts between the two countries, concluded at Westminster in 1678. In the preamble to this treaty, the preservation of each other's dominions was stated as the cause of making it; and it stipulated a mutual guaranty of all they already enjoyed, or might thereafter acquire by treaties of peace, "in Europe only." They further guaranteed all treaties which were at that time made, or might thereafter conjointly be made, with any other power. They stipulated also to defend and preserve each other in the possession of all towns and fortresses which did at that time belong, or should in future belong, to either of them; and, that for this purpose when either nation was

(*o*) Grotius, de Jur. Bel. ac Pac. lib. ii. cap. 15, § 13; cap. 25, § 4. Bynkershoek, Quæst. Jur. Pub. lib. i. cap. 9. Vattel, Droit des Gens, liv. ii. ch. 12, § 168; liv. iii. ch. 6, §§ 86—96.

attacked or molested, the other should immediately succour it with a certain number of troops and ships, and should be obliged to break with the aggressor in two months after the party that was already at war should require it; and that they should then act conjointly, with all their forces, to bring the common enemy to a reasonable accommodation.

The second defensive alliance then subsisting between Great Britain and Holland was that stipulated by the treaties of barrier and succession, of 1709 and 1713, by which the Dutch barrier on the side of Flanders was guaranteed on the one part, and the Protestant succession to the British crown, on the other; and it was mutually stipulated, that, in case either party should be attacked, the other should furnish, at the requisition of the injured party, certain specified succours; and if the danger should be such as to require a greater force, the other ally should be obliged to augment his succours, and ultimately to act with all his power in open war against the aggressor.

The third and last defensive alliance between the same powers, was the treaty concluded at the Hague in 1717, to which France was also a party. The object of this treaty was declared to be the preservation of each other reciprocally, and the possession of their dominions, as established by the treaty of Utrecht. The contracting parties stipulated to defend all and each of the articles of the said treaty, as far as they relate to the contracting parties respectively, or each of them in particular; and they guarantee all the kingdoms, provinces, states, rights, and advantages, which each of the parties at the signing of that treaty possessed, confining this guaranty to Europe only. The succours stipulated by this treaty were similar to those above mentioned; first, interposition of good offices, then a certain number of forces, and lastly, declaration of war. This treaty was renewed by the quadruple alliance of 1718, and by the treaty of Aix-la-Chapelle, 1748.

§ 282. England and the States-General

It was alleged on the part of the British court, that the States-General had refused to comply with the terms of these treaties, although Minorca, a possession *in Europe* which had been secured to Great Britain by the treaty of Utrecht, was attacked by France.

Two answers were given by the Dutch government to the demand of the stipulated succours:—

1. That Great Britain was the aggressor in the war; and that, unless she had been first attacked by France, the *casus fœderis* did not arise.

2. That admitting that France was the aggressor in Europe, yet it was only in consequence of the hostilities previously commenced in America, which were expressly excepted from the terms of the guaranties.

§ 283. Reply of Lord Liverpool.

To the first of these objections it was irresistibly replied by the elder Lord Liverpool, that although the treaties which contained these guaranties were called defensive treaties only, yet the words of them, and particularly that of 1678, which was the basis of all the rest, by no means expressed the point clearly in the sense of the objection, since they guaranteed "all the rights and possessions" of both parties, against "all kings, princes, republics, and states;" so that if either should "be attacked or molested by hostile act, or open war, or in any other manner disturbed in the possession of his states, territories, rights, immunities, and freedom of commerce," it was then declared what should be done in defence of these objects of the guaranty, by the ally who was not at war, but it was nowhere mentioned as necessary that the attack of these should be the first injury or attack. "Nor," continues Lord Liverpool, "doth this loose manner of expression appear to have been an omission or inaccuracy. They who framed these guaranties certainly chose to leave this question, without any further explanation, to that good faith which must ultimately decide upon all contracts between sovereign States. It is not presumed that they hereby meant, that either party should be obliged to support every act of violence or injustice which his ally might be prompted to commit through views of interest or ambition; but, on the other hand, they were cautious of affording too frequent opportunities to pretend that the case of the guaranties did not exist, and of eluding thereby the principal intention of the alliance; both these inconveniences were equally to be avoided; and they wisely thought fit to guard against the latter, no less than the former. They knew that in every war between civilized nations, each party endeavours to throw

upon the other the odium and guilt of the first act of provocation and aggression; and that the worst of causes was never without its excuse. They foresaw that this alone would unavoidably give sufficient occasion to endless cavils and disputes, whenever the infidelity of an ally inclined him to avail himself of them. To have confined, therefore, the case of the guaranty by a more minute description of it, and under closer restrictions of form, would have subjected to still greater uncertainty a point which, from the nature of the thing itself, was already too liable to doubt:—they were sensible that the cases would be infinitely various; that the motives to self-defence, though just, might not always be apparent; that an artful enemy might disguise the most alarming preparations; and that an injured nation might be necessitated to commit even a preventive hostility, before the danger which caused it could be publicly known. Upon such considerations, these negotiators wisely thought proper to give the greatest latitude to this question, and to leave it open to a fair and liberal construction, such as might be expected from friends, whose interests these treaties were supposed to have forever united" (*p*).

His lordship's answer to the next objection, that the hostilities, commenced by France in Europe, were only in consequence of hostilities previously commenced in America, seems equally satisfactory, and will serve to illustrate the good faith by which these contracts ought to be interpreted. "If the reasoning on which this objection is founded was admitted, it would alone be sufficient to destroy the effects of every guaranty, and to extinguish the confidence which nations mutually place in each other, on the faith of defensive alliances; it points out to the enemy a certain method of avoiding the inconvenience of such an alliance; it shows him where he ought to begin his attack. Let only the first effort be made upon some place not included in the guaranty, and, after that, he may pursue his views against its very object, without any apprehension of the consequence. Let France first attack some little spot belonging to Holland, in America,

(*p*) Discourse on the Conduct of the Government of Great Britain in respect to Neutral Nations. By Charles, Earl of Liverpool. 1st ed. 1757.

and her barrier would be no longer guaranteed. To argue in this manner is to trifle with the most solemn engagements. The proper object of guaranties is the preservation of some particular country to some particular power. The treaties above mentioned promise the defence of the dominions of each party in Europe, simply and absolutely, whenever they are *attacked* or *molested*. If, in the present war, the first attack was made out of Europe, it is manifest that long ago an attack hath been made in Europe; and that is, beyond a doubt, the case of these guaranties.

"Let us try, however, if we cannot discover what hath once been the opinion of Holland upon a point of this nature. It hath already been observed that the defensive alliance between England and Holland, of 1678, is but a copy of the first twelve articles of the French Treaty of 1662. Soon after Holland had concluded this last alliance with France, she became engaged in a war with England. The attack then began, as in the present case, out of Europe, on the coast of Guinea; and the cause of the war was also the same,—a disputed right to certain possessions out of the bounds of Europe, some in Africa, and others in the East Indies. Hostilities having continued for some time in those parts, they afterwards commenced also in Europe. Immediately upon this, Holland declared that the case of that guaranty did exist, and demanded the succours which were stipulated. I need not produce the memorials of their ministers to prove this; history sufficiently informs us that France acknowledged the claim, granted the succours, and entered even into open war in the defence of her ally. Here, then, we have the sentiments of Holland on the same article, in a case minutely parallel. The conduct of France also pleads in favour of the same opinion, though her concession, in this respect, checked at that time her youthful monarch in the first essay of his ambition, delayed for some months his entrance into the Spanish provinces, and brought on him the enmity of England" (*q*).

§ 284. Alliance between Great Britain and Portugal.

The nature and extent of the obligations contracted by treaties of defensive alliance and guaranty, will be further illustrated by the case of the treaties subsisting between

(*q*) Liverpool's Discourse, p. 86.

Great Britain and Portugal, which has been before alluded to for another purpose (*r*). The treaty of alliance, originally concluded between these powers in 1642, immediately after the revolt of the Portuguese nation against Spain, and the establishment of the House of Braganza on the throne, was renewed, in 1654, by the Protector, Cromwell, and again confirmed by the Treaty of 1661, between Charles II. and Alfonzo VI., for the marriage of the former prince with Catharine of Braganza. This last-mentioned treaty fixes the aid to be given, and declares that Great Britain will succour Portugal "on all occasions, when that country is attacked." By a secret article, Charles II., in consideration of the cession of Tangier and Bombay, binds himself "to defend the colonies and conquests of Portugal against all enemies, present or future." In 1703, another treaty of defensive and perpetual alliance was concluded at Lisbon, between Great Britain and the States-General on the one side, and the King of Portugal on the other; the guaranties contained in which were again confirmed by the treaties of peace at Utrecht, between Portugal and France, in 1713, and between Portugal and Spain, in 1715. On the emigration of the Portuguese royal family to Brazil, in 1807, a convention was concluded between Great Britain and Portugal, by which the latter kingdom is guaranteed to the lawful heir of the House of Braganza, and the British government promises never to recognize any other ruler. By the more recent treaty between the two powers, concluded at Rio Janeiro, in 1810, it was declared "that the two powers have agreed on an alliance for defence, and reciprocal guaranty against every hostile attack, conformably to the treaties already subsisting between them, the stipulations of which shall remain in full force, and are renewed by the present treaty in their fullest and most extensive interpretation." This treaty confirms the stipulation of Great Britain to acknowledge no other sovereign of Portugal but the heir of the House of Braganza. The Treaty of Vienna, of the 22nd January, 1815, between Great Britain and Portugal, contains the following article:—"The treaty of alliance at Rio Janeiro, of the 19th February, 1810,

(*r*) *Vide ante*, pt. ii. ch. 1, § 68.

being founded on temporary circumstances, which have happily ceased to exist, the said treaty is hereby declared to be of no effect; without prejudice, however, to the ancient treaties of alliance, friendship, and guaranty, which have so long and so happily subsisted between the two crowns, and which are hereby renewed by the high contracting parties, and acknowleged to be of full force and effect."

§ 285. *Casus fœderis* of the alliance.

Such was the nature of the compacts of alliance and guaranty subsisting between Great Britain and Portugal, at the time when the interference of Spain in the affairs of the latter kingdom compelled the British government to interfere, for the protection of the Portuguese nation against the hostile designs of the Spanish court. In addition to the grounds stated in the British Parliament, to justify this counteracting interference, it was urged, in a very able article on the affairs of Portugal, contemporaneously published in the Edinburgh Review, that although, in general, an alliance for defence and guaranty does not impose any obligation, nor, indeed, give any warrant to interfere in intestine divisions, the peculiar circumstances of the case did constitute the *casus fœderis* contemplated by the treaties in question. A defensive alliance is a contract between several States, by which they agree to aid each other in their defensive (or, in other words, in their just) wars against other States. Morally speaking, no other species of alliance is just, because no other species of war can be just. The simplest case of defensive war is, where our ally is openly invaded with military force, by a power to whom she has given no just cause of war. If France or Spain, for instance, had marched an army into Portugal to subvert its constitutional government, the duty of England would have been too evident to render a statement of it necessary. But this was not the only case to which the treaties were applicable. If troops were assembled and preparations made, with the manifest purpose of aggression against an ally; if his subjects were instigated to revolt, and his soldiers to mutiny; if insurgents on his territory were supplied with money, with arms, and military stores; if, at the same time, his authority were treated as an usurpation, and all participation in the protection granted to other foreigners refused to the well-affected part of his subjects,

while those who proclaimed their hostility to his person were received as the most favoured strangers; in such a combination of circumstances, it could not be doubted that the case foreseen by defensive alliances would arise, and that he would be entitled to claim that succour, either general or specific, for which his alliances had been stipulated. The wrong would be as complete, and the danger might be as great, as if his territory were invaded by a foreign force. The mode chosen by his enemy might even be more effectual, and more certainly destructive, than open war. Whether the attack made on him be open or secret, or if it be equally unjust, and expose him to the same peril, he is equally authorized to call for aid. All contracts, under the law of nations, are interpreted as extending to every case manifestly and certainly parallel to those cases for which they provide by express words. In that law, which has no tribunal but the conscience of mankind, there is no distinction between the evasion and the violation of a contract. It requires aid against disguised as much as against avowed injustice; and it does not fall into so gross an absurdity as to make the obligation to succour less where the danger is greater. The only rule for the interpretation of defensive alliances seems to be, that every wrong which gives to one ally a just cause of war entitles him to succour from the other ally. The right to aid is a secondary right, incident to that of repelling injustice by force. Wherever he may morally employ his own strength for that purpose, he may, with reason, demand the auxiliary strength of his ally (*s*). Fraud neither gives nor takes away any right. Had France, in the year 1715, assembled squadrons in her harbours and troops on her coasts; had she prompted and distributed writings against the legitimate government of George I.; had she received with open arms battalions of deserters from his troops, and furnished the army of the Earl of Mar with pay and arms when he proclaimed the Pretender; Great Britain, after demand and refusal of reparation, would have had a perfect right to declare war against France, and,

(*s*) Vattel's reasoning is still more conclusive in a case of guaranty:—Si l'alliance défensive porte une guarantie de toutes les terres que l'allié possède actuellement, le *casus fœderis* se déploie toutes les fois que ces terres sont envahies *ou menacées d'invasion.*" Liv. iii. ch. 6, § 91.

consequently, as complete a title to the succour which the States-General were bound to furnish, by their treaties of alliance and guaranty of the succession of the House of Hanover, as if the pretended king, James III., at the head of the French army, were marching on London. The war would be equally defensive on the part of England, and the obligation equally incumbent on Holland. It would show a more than ordinary defect of understanding, to confound a war defensive in its *principles* with a war defensive in its *operations*. Where attack is the best mode of providing for the defence of a State, the war is defensive in principle, though the operations are offensive. Where the war is unnecessary to safety, its *offensive* character is not altered; because the wrongdoer is reduced to defensive warfare. So a State, against which dangerous wrong is manifestly meditated, may prevent it by striking the first blow, without thereby waging a war in its principle offensive. Accordingly, it is not every attack made on a State that will entitle it to aid under a defensive alliance; for if that State had given just cause of war to the invader, the war would not be, on its part, defensive in principle (*t*).

§ 286. Hostages for the execution of treaties.

The execution of a treaty is sometimes secured by *hostages* given by one party to the other. The most recent and remarkable example of this practice occurred at the peace of Aix-la-Chapelle, in 1748; where the restitution of Cape Breton, in North America, by Great Britain to France, was secured by several British peers sent as hostages to Paris (*u*).

§ 287. Interpretation of treaties.

Public treaties are to be interpreted like other laws and contracts. Such is the inevitable imperfection and ambiguity of all human language, that the mere words alone of any writing, literally expounded, will go a very little way towards explaining its meaning. Certain technical rules of interpretation have, therefore, been adopted by writers on ethics and public law, to explain the meaning of international compacts, in cases of doubt. These rules are fully expounded by Grotius and his commentators; and the reader is referred

(*t*) "Dans une alliance défensive le *casus fœderis* n'existe pas tout de suite dès que notre allié est attaqué. Il faut voir encore s'il n'a point donné à son ennemi un juste sujet de lui faire la guerre. S'il est dans le tort, il faut l'engager à donner une satisfaction raisonnable." Vattel, liv. iii. ch. 6, § 90.

(*u*) Vattel, liv. ii. ch. 16, §§ 245—261.

especially to the principles laid down by Vattel and Rutherforth, as containing the most complete view of this important subject (*x*).

§ 287a. Rules for interpretation.

The dispute between England and the United States respecting the settlement of the North West boundary between the Union and Canada, turned on the interpretation to be put upon existing treaties. England submitted to the Emperor of Germany, who was appointed arbitrator, the following rules of interpretation.

1. The words of a treaty are to be taken to be used in the sense in which they were commonly used at the time when the treaty was entered into.

2. In interpreting any expressions in a treaty, regard must be had to the context and spirit of the whole treaty.

3. The interpretation should be drawn from the connection and relation of the different parts.

4. The interpretation should be suitable to the reason of the treaty.

5. Treaties are to be interpreted in a favourable, rather than an odious sense.

6. Whatever interpretation tends to change the existing state of things at the time the treaty was made is to be ranked in the class of odious things (*y*).

§ 288. Mediation.

Negotiations are sometimes conducted under the mediation of a third power, spontaneously tendering its good offices for that purpose, or upon the request of one or both of the litigating powers, or in virtue of a previous stipulation for that purpose. If the mediation is spontaneously offered, it may be refused by either party; but if it is the result of a previous agreement between the two parties, it cannot be refused without a breach of good faith. When accepted by both parties, it becomes the right and the duty of the mediating power to interpose its advice, with a view to the adjustment of their differences. It thus becomes a party to the negotiation, but has no authority to constrain either party to adopt its opinion. Nor is it obliged to guarantee the performance of the treaty concluded under its mediation, though, in point of fact, it frequently does so (*z*).

§ 288a. The Treaty of Paris, 1856.

It was stipulated at the Treaty of Paris (1856), that "If there should arise between the Sublime Porte and one or more of the other signing

(*x*) Grotius, de Jur. Bel. ac Pac. lib. ii. cap. 16. Vattel, liv. ii. ch. 17. Rutherforth, Inst. b. ii. ch. 7.

(*y*) [Parl. Papers, N. America, 1873 (No. 3), pp. 6—9. Vattel, l. ii. ch. 17, §§ 271, 285—287, 301; ch. 18, § 305].

(*z*) Klüber, Droit des Gens Moderne de l'Europe, pt. ii. tit. 2, § 1; ch. 2, § 160.

Powers, any misunderstanding which might endanger the maintenance of their relations, the Sublime Porte and each of such Powers, before having recourse to the use of force, shall afford the other contracting parties the opportunity of preventing such an extremity by means of their mediation" (*a*). At a Conference of the Powers who signed the Treaty of Paris, their Plenipotentiaries, in a protocol dated 14th April, 1856, expressed "in the name of their Governments, the wish that States between which any serious misunderstanding may arise, should, before appealing to arms, have recourse, as far as circumstances might allow, to the good offices of a friendly Power. The Plenipotentiaries hope that the Governments not represented at the Congress, will unite in the sentiment which has inspired the wish recorded in the present protocol" (*b*).

Nevertheless, it can hardly be said that wars have been less frequent since these declarations, even among the Powers actually making them. The protocol was invoked to prevent the Dano-German war of 1864, and the Austro-Prussian war of 1866, but without effect. The Conference which met at Constantinople in 1876 attempted to settle the dispute between Russia and Turkey in a peaceable manner, but it failed to bring about such a result. Lord Granville, in 1870, appealed to France and Prussia to have recourse to mediation, but in vain (*c*). Even after hostilities had commenced, Her Majesty's Government assured France that "if at any time recourse should be had to their good offices, they would be freely given and zealously exerted" (*d*).

§ 288b. Arbitration.

Yet though wars have been unfortunately frequent of late years several serious disputes have also been settled by the peaceful method of an appeal to arbitration (*e*). The most notable instance of this in recent times is the Treaty of Washington, 1871. By that convention, five different causes of disagreement between England and the United States, some of them of very long standing, were referred to different tribunals of arbitration, and a peaceful solution obtained. It is sincerely to be hoped that such an example may be followed in the future by other States.

Decision of majority.

A question was recently raised between England and the United States as to the effect to be given to an award in which only a majority of the arbitrators concurred, when no provision had been made for this in the agreement of reference. The Treaty of Washington constituted four boards of arbitrators. As regards three of these boards, it was provided that the votes of a majority should be conclusive; but as regards the fourth, viz., the one to meet at Halifax and decide the fishery question, no such provision was made. When the award was made, Mr. Evarts, the American Foreign Secretary, raised an objection to its validity on the ground (among others) that only two out of the three arbitrators had concurred in it. Lord Salisbury declined to give any weight to this objection, and asserted it to be a principle of inter-

(*a*) [Art. viii. See Hertslet, Map of Europe, vol. ii. p. 1255].
(*b*) [Ibid. p. 1279].
(*c*) [Annual Register, 1870. Pub. Docs. p. 204].
(*d*) [Annual Register, 1871. Pub. Docs. p. 248].
(*e*) [Calvo, Droit Int. vol. i. p. 794. Several instances are there collected. See also, Revue de Droit Int. 1874, p. 117, and 1875, p. 57].

national law that, in arbitrations of a public nature, the majority of the arbitrators binds the minority, unless the contrary be expressed (*f*).

§ 288c. Conferences.

Another method of peaceably settling international disputes, is by summoning a conference or congress of various States, and discussing the claims of each party. This has frequently been done in Europe, the last instance being the celebrated Congress of Berlin (*g*).

§ 289. Diplomatic history.

The art of negotiation seems, from its very nature, hardly capable of being reduced to a systematic science. It depends essentially on personal character and qualities, united with a knowledge of the world and experience in business. These talents may be strengthened by the study of history, and especially the history of diplomatic negotiations; but the want of them can hardly be supplied by any knowledge derived merely from books. One of the earliest works of this kind is that commonly called *Le Parfait Ambassadeur*, originally published in Spanish by Don Antonio de Vera, long time ambassador of Spain at Venice, who died in 1658. It was subsequently published by the author in Latin, and different translations appeared in Italian and French. Wicquefort's book, published in 1679, under the title of *L'Ambassadeur et ses Fonctions*, although its principal object is to treat of the rights of legation, contains much valuable information upon the art of negotiation. Callières, one of the French plenipotentiaries at the treaty of Ryswick, published in 1716, a work entitled *De la Manière de Négocier avec les Souverains*, which obtained considerable reputation. The Abbé Mably also attempted to treat this subject systematically, in an essay entitled *Principes des Négotiations*, which is commonly prefixed as an introduction to his *Droit Publique de l'Europe* in the various editions of the works of that author. A catalogue of the different histories which have appeared of particular negotiations would be almost interminable, but nearly all that is valuable in them will be found collected in the excellent work of M. Flassan, entitled *L'Histoire de la Diplomatie Française*. The late Count de Ségur's compilation from the papers of Favier, one of the principal secret agents employed in the double diplomacy of Louis XV., entitled *Politique de tous les*

(*f*) [Lord Salisbury to Mr. Welsh, 7th Nov., 1878. See Supplement to London Gazette, 16th Nov., 1878. Halleck by Sir S. Baker, ch. xiv. s. 6. Bluntschli, sec. 493. Calvo, i. p. 791].

(*g*) [See Calvo, p. 799.]

Cabinets de l'Europe pendant les Règnes de Louis XV. et de Louis XVI., with the notes of the able and experienced editor, is a work which also throws great light upon the history of French diplomacy. A history of treaties from the earliest times to the emperor Charlemagne, collected from the ancient Latin and Greek authors, and from other monuments of antiquity, was published by Barbeyrac in 1739 (*h*). It had been preceded by the immense collection of Dumont, embracing all the public treaties of Europe from the age of Charlemagne to the commencement of the eighteenth century (*i*). The best collections of the more modern European treaties are those published at different periods by Professor Martens, of Göttingen, including the most important public acts upon which the present conventional law of Europe is founded. To these may be added Koch's *Histoire abrégée des Traités de Paix depuis la Paix de Westphalie*, continued by Schöll. A complete collection of the proceedings of the congress of Vienna has also been published in German, by Klüber (*k*).

§ 289a. Hertslet's works.

The most complete, and indeed the only collection of the treaties, by which Great Britain is bound, is published under the name of Hertslet's Commercial treaties. One of the most useful works to all students of international law and modern European history has recently been published by Mr. Hertslet, entitled "The Map of Europe by Treaty." All treaties and other important documents relating to the international affairs of Europe, from 1815 to 1875, are there collected and arranged in chronological order.

The index to this work is one of the most remarkable and lucid ever compiled, and a reference to it will enable the student to trace the history of any international transaction, within the specified period, with the greatest ease.

(*h*) Histoire des Anciens Traités, par Barbeyrac, forming the first volume of Dumont's Supplément au Corps Diplomatique.

(*i*) Corps Universel Diplomatique du Droit des Gens, &c., 8 tomes, fol. Amsterd. 1726—1731. Supplément au Corps Universel Diplomatique, 5 tomes, fol. 1739.

(*k*) Acten des Wiener Congresses in den Jahren, 1814 und 1815; von J. L. Klüber, Erlangen, 1815 und 1816; 6 Bde. 8vo.

PART FOURTH.

INTERNATIONAL RIGHTS OF STATES IN THEIR HOSTILE RELATIONS.

CHAPTER I.

COMMENCEMENT OF WAR, AND ITS IMMEDIATE EFFECTS.

§ 290. Redress by forcible means between nations.

THE independent societies of men, called States, acknowledge no common arbiter or judge, except such as are constituted by special compact. The law by which they are governed, or profess to be governed, is deficient in those positive sanctions which are annexed to the municipal code of each distinct society. Every State has therefore a right to resort to force, as the only means of redress for injuries inflicted upon it by others, in the same manner as individuals would be entitled to that remedy were they not subject to the laws of civil society. Each State is also entitled to judge for itself, what are the nature and extent of the injuries which will justify such a means of redress.

Among the various modes of terminating the differences between nations, by forcible means short of actual war, are the following:—

1. By laying an embargo or sequestration on the ships and goods, or other property of the offending nation, found within the territory of the injured State.

2. By taking forcible possession of the thing in controversy, by securing to yourself by force, and refusing to the other nation, the enjoyment of the right drawn in question.

3. By exercising the right of vindictive retaliation (*retorsio facti*), or of amicable retaliation (*rétorsion de droit*); by which last, the one nation applies, in its transactions with the other,

the same rule of conduct by which that other is governed under similar circumstances.

4. By making reprisals upon the persons and things belonging to the offending nation, until a satisfactory reparation is made for the alleged injury (*a*).

§ 291. Reprisals.

This last seems to extend to every species of forcible means for procuring redress, short of actual war, and, of course, to include all the others above enumerated. Reprisals are *negative*, when a State refuses to fulfil a perfect obligation which it has contracted, or to permit another nation to enjoy a right which it claims. They are *positive*, when they consist in seizing the persons and effects belonging to the other nation, in order to obtain satisfaction (*b*).

Reprisals are also either *general* or *special*. They are *general*, when a State which has received, or supposes it has received, an injury from another nation, delivers commissions to its officers and subjects to take the persons and property belonging to the other nation, wherever the same may be found. It is, according to present usage, the first step which is usually taken at the commencement of a public war, and may be considered as amounting to a declaration of hostilities, unless satisfaction is made by the offending State. *Special* reprisals are, where letters of marque are granted, in time of peace, to particular individuals who have suffered an injury from the government or subjects of another nation (*c*).

Reprisals are to be granted only in case of a clear and open denial of justice. The right of granting them is vested in the sovereign or supreme power of the State, and, in former times, was regulated by treaties and by the municipal ordinances of different nations. Thus, in England, the statute of 4 Hen. V., cap. 7, declares, "That if any subjects of the realm are oppressed in time of peace by any foreigners, the king will grant marque in due form to all that feel themselves grieved;" which form is specially pointed out, and directed to be observed in the statute. So also, in France, the celebrated marine ordinance of Louis XIV. of 1681, prescribed the

(*a*) Vattel, liv. ii. ch. 18. Klüber, Droit des Gens Moderne de l'Europe, § 234.
(*b*) Klüber, § 234, note (*c*).
(*c*) Bynkershoek, Quæst. Jur. Pub. lib. i. Duponceau's Transl. p. 182, note.

forms to be observed for obtaining special letters of marque by French subjects against those of other nations. But these special reprisals in time of peace have almost entirely fallen into disuse (*d*).

§ 292. Effect of reprisals.

Any of these acts of reprisal, or resort to forcible means of redress between nations, may assume the character of war in case adequate satisfaction is refused by the offending State. "Reprisals," says Vattel, "are used between nation and nation, in order to do themselves justice when they cannot otherwise obtain it. If a nation has taken possession of what belongs to another, if it refuses to pay a debt, to repair an injury, or give adequate satisfaction for it, the latter may seize something belonging to the former, and apply it to its own advantage, till it obtains payment of what is due, together with interest and damages; or keep it as a pledge till the offending nation has refused ample satisfaction. The effects thus seized are preserved, while there is any hope of obtaining satisfaction or justice. As soon as that hope disappears they are confiscated, and then reprisals are accomplished. If the two nations, upon this ground of quarrel, come to an open rupture, satisfaction is considered as refused from the moment that war is declared, or hostilities commenced; and then, also, the effects seized may be confiscated" (*e*).

§ 293. Embargo previous to declaration of hostilities.

Thus, where an embargo was laid on Dutch property in the ports of Great Britain, on the rupture of the peace of Amiens, in 1803, under such circumstances as were considered by the British government as constituting a hostile aggression on the part of Holland, Sir W. Scott (Lord Stowell), in delivering his judgment in this case, said, that "the seizure was at first equivocal; and if the matter in dispute had terminated in reconciliation, the seizure would have been converted into a mere civil embargo, so terminated. Such would have been the retroactive effect of that course of circumstances. On the contrary, if the transaction end in hostility, the retroactive effect is exactly the other way. It impresses the direct hostile character upon the original seizure; it is declared to be no embargo; it is no longer an equivocal act, subject to

(*d*) Vattel, Droit des Gens, liv. ii. ch. 18, §§ 342—346. Bynkershoek, Quæst. Jur. Pub. lib. i. cap. 24. Martens, Précis. liv. viii. ch. 2, § 260. Martens, Essai concernant les Armateurs, § 4.

(*e*) Vattel, Droit des Gens, liv. ii. ch. 18, § 342.

two interpretations; there is a declaration of the *animus* by which it is done; that it was done *hostili animo*, and it is to be considered as a hostile measure, *ab initio*, against persons guilty of injuries which they refuse to redeem, by any amicable alteration of their measures. This is the necessary course, if no particular compact intervenes for the restoration of such property, taken before a formal declaration of hostilities"(*f*).

§ 293a. Case of Don Pacifico.

One of the last cases of reprisals being enforced by England was not a very dignified one, and ended in something like a farce. Don Pacifico, a native of Gibraltar, and consequently a British subject, went to reside at Athens, and while there, in 1849, a mob, aided, it was said by Greek soldiers, broke into and plundered his house. Pacifico did not apply to the Greek tribunals for redress, but invoked the aid of England. On the refusal of Greece to grant compensation, the British fleet was ordered to lay an embargo on all Greek vessels in Greek ports. France offered her mediation, but Greece was practically compelled to accept the terms imposed by England. Three commissioners were appointed to examine Pacifico's claims. These had now swollen to £21,295 1*s.* 4*d.*, and the commissioners, after duly examining them, awarded him £150! (*g*) The English Foreign Secretary defended these proceedings by alleging that to have recourse to the Greek tribunals was at that time ridiculous, and that no justice could be expected from them. Sir R. Phillimore however thinks that the evidence of this was "not of that overwhelming character which alone could warrant an exception from the well-known and valuable rule of international law upon questions of this description" (*h*), viz., the rule that application must first be made to the local courts.

§ 293b. Reprisals against Brazil in 1861.

In 1861, a British ship, *The Prince of Wales*, was wrecked on the Brazilian coast, and the English Consul came to the conclusion that the wreck had been plundered, and some of the sailors murdered. Compensation was demanded by England, and on its refusal, a British ship of war blockaded Rio de Janeiro for six days, and five Brazilian ships were captured. These were shortly after restored, and the sum of £3,200 paid by Brazil under protest. International relations were suspended between England and Brazil until 1865, when the affair was settled by the mediation of the King of Portugal (*i*).

§ 293c. Droit d'angarie.

"There is yet another measure," says Sir R. Phillimore, "partaking also of a belligerent character, though exercised, strictly speaking, in time of peace, called by the French *le droit d'angarie*. It is an act of the State by which foreign as well as private domestic vessels which

(*f*) *The Bœdes Lust*, 5 C. Rob. 246; [*The Gertruyda*, 2 C. Rob. 219; *The Theresa Bonita*, 4 C. Rob. 431.]
(*g*) [Correspondence respecting M. Pacifico's claims. Parl. Papers, 1851].
(*h*) [Phillimore, vol. iii. p. 41 (2nd ed.)].
(*i*) [Calvo, vol. i. § 676].

happen to be within the jurisdiction of the State are seized upon and compelled to transport soldiers, ammunition, or other instruments of war; in other words, to become parties against their will to carrying on direct hostilities against a power with whom they are at peace" (*k*).

During the Franco-German war of 1870, the German troops seized upon six English vessels in the Seine, and scuttled them. Prince Bismarck admitted their destruction, and offered to pay the value according to equitable estimation. He contended "that the measure in question, however exceptional in its nature, did not overstep the bounds of international warlike usages. A pressing danger was at hand, and every other means of averting it was wanting; the case was therefore one of necessity, which even in time of peace may render the employment or destruction of foreign property admissible, under reservation of indemnification." The German Chancellor then quoted the above passage from Sir R. Phillimore's work (*l*). The English shipowners were afterwards compensated for their loss.

§ 294. Right of making war, in whom vested.

The right of making war, as well as of authorizing reprisals, or other acts of vindictive retaliation, belongs in every civilized nation to the supreme power of the State. The exercise of this right is regulated by the fundamental laws or municipal constitution in each country, and may be delegated to its inferior authorities in remote possessions, or even to a commercial corporation—such, for example, as the British East India Company—exercising, under the authority of the State, sovereign rights in respect to foreign nations (*m*).

§ 295. Public or solemn war.

A contest by force between independent sovereign States is called a public war. If it is declared in form, or duly commenced, it entitles both the belligerent parties to all the rights of war against each other. The voluntary or positive law of nations makes no distinction in this respect between a just and an unjust war. A war in form, or duly commenced, is to be considered, as to its effects, as just on both sides. Whatever is permitted, by the laws of war, to one of the belligerent parties, is equally permitted to the other (*n*).

§ 296. Perfect or imperfect war.

A *perfect* war is where one whole nation is at war with another nation, and all the members of both nations are authorized to commit hostilities against all the members of

(*k*) [Phillimore, vol. iii. p. 49].
(*l*) [Annual Reg. 1871. Pub. Docts. p. 257].
(*m*) Vattel, liv. iii. ch. 1, § 4. Martens, Précis, &c., liv. viii. ch. 2, §§ 260, 264. See *ante*, § 17.
(*n*) Vattel, Droit des Gens, liv. iii. ch. 12. Rutherforth's Inst. b. ii. ch. 9, § 15.

the other, in every case and under every circumstance permitted by the general laws of war. An *imperfect* war is limited as to places, persons, and things (*o*).

A civil war between the different members of the same society is what *Grotius* calls a *mixed* war; it is, according to him, *public* on the side of the established government, and *private* on the part of the people resisting its authority. But the general usage of nations regards such a war as entitling both the contending parties to all the rights of war as against each other, and even as respects neutral nations (*p*).

§ 296a. Civil war.

It seems to be now settled that it is unnecessary in order to constitute a war, that both parties should be acknowledged as independent nations or sovereign States. A war may exist where one of the belligerents claims sovereign rights as against the other (*q*). Whether the struggle is a war, or is not, is to be determined, not from the relation of the combatants to each other, but from the mode in which it is carried on.

During the civil war, the United States government treated the Confederates as belligerents in all matters relating to the war. Thus their territory was for the time being considered as enemy territory, and the subjects of the rebellious States as alien enemies (*r*). But this was only a belligerent *status*. The union was declared to be indissoluble, and the Confederate States, while endeavouring to leave it, never legally ceased to be within it, or their subjects citizens of the Union (*s*). It was, however, necessary to accord a *de facto* existence to the Confederate government, in certain matters not strictly rights of war. Thus the supreme court held, that where land was sold to the rebel government, and was then captured by the United States, it became the property of the United States, thus recognizing the validity of a sale from the owner to the Confederate government (*t*). Again, contracts payable in Confederate notes were enforced, and the parties compelled to pay at the real, and not the nominal, value of the notes, at the time when payment was due. The notes were treated as a currency imposed upon the community by irresistible force (*u*).

§ 297. Declaration of war, how far necessary.

A formal declaration of war to the enemy was once considered necessary to legalize hostilities between nations. It

(*o*) Such were the limited hostilities authorized by the United States against France in 1798. Dallas' Rep. vol. ii. p. 21; vol. iv. p. 37.

(*p*) *Vide ante*, pt. i. ch. 2, § 26, *et seq.*

(*q*) [*The Prize Causes*, 2 Black. 666; *Rose* v. *Himely*, 4 Cranch, 272].

(*r*) [*Thorington* v. *Smith*, 8 Wallace, 10; *Mrs. Alexander's cotton*, 2 Wallace, 404].

(*s*) [*Texas* v. *White*, 7 Wallace, 726; *White* v. *Hart*, 13 Wallace, 646].

(*t*) [*U. S., Lyon et al* v. *Huckabee*, 16 Wallace, 414].

(*u*) [*The Confederate Note case*, 19 Wallace, 556; *Thorington* v. *Smith*, 8 Wallace, 1; *Hardner* v. *Woodruff*, 15 Wallace, 448].

was uniformly practised by the ancient Romans, and by the States of modern Europe until about the middle of the seventeenth century. The latest example of this kind was the declaration of war by France against Spain, at Brussels, in 1635, by heralds at arms, according to the forms observed during the middle age. The present usage is to publish a manifesto, within the territory of the State declaring war, announcing the existence of hostilities and the motives for commencing them. This publication may be necessary for the instruction and direction of the subjects of the belligerent State in respect to their intercourse with the enemy, and regarding certain effects which the voluntary law of nations attributes to war in form. Without such a declaration, it might be difficult to distinguish in a treaty of peace those acts which are to be accounted lawful effects of war, from those which either nation may consider as naked wrongs, and for which they may, under certain circumstances, claim reparation (*x*).

§ 297a. No declaration of a civil war.

A civil war is never declared, it becomes such by its accidents—the number, power, and organization of the persons who originate and carry it on. The American civil war "sprang forth suddenly from the parent brain, a Minerva in the full panoply of war" (*y*). The Crimean war was preceded by every possible formality between England and Russia; but in 1877 the Russian troops entered Turkish territory some hours before any declaration of war was issued (*z*). M. Calvo deems a declaration necessary, "*pour légitimer l'état de guerre*" (*a*), but he admits that many recent wars have been commenced without this formality (*b*). A war can exist *de facto* without any declaration, but in such a case hostilities must have actually commenced (*c*)

§ 298. Enemy's property found in the territory on the commencement of

As no declaration, or other notice to the enemy, of the existence of war, is necessary, in order to legalize hostilities, and as the property of the enemy is, in general, liable to seizure and confiscation as prize of war, it would seem to follow as a consequence, that the property belonging to him

(*x*) Grotius, de Jur. Bel. ac Pac. lib. i. cap. 3, § 4. Bynkershoek, Quæst. Jur. Pub. lib. i. cap. 2. Rutherforth's Inst. b. ii. ch. 9, § 10. Vattel, Droit des Gens, liv. iii. ch. 4, § 56. Klüber, Droit des Gens Moderne de l'Europe, §§ 238, 239.

(*y*) [*The Prize Causes*, 2 Black. 669].

(*z*) [Phillimore, vol. iii. § 64; Parl. Papers. Turkey, 1877 (No. 26), p. 86].

(*a*) [Calvo, vol. ii. § 714, p. 33].

(*b*) [See also, *The Nayade*, 4 C. Rob. 253; *The Eliza Ann*, 1 Dods. Ad. 247; *The Success*, 1 Dods. Ad. 133].

(*c*) [*The Teutonia*, L. R. 4 P. C. 179].

war, how far liable to confiscation.

and found within the territory of the belligerent State at the commencement of hostilities, is liable to the same fate with his other property wheresoever situated. But there is a great diversity of opinions upon this subject among institutional writers, and the tendency of modern usage between nations seems to be, to exempt such property from the operations of war.

One of the exceptions to the general rule, laid down by the text writers, which subjects all the property of the enemy to capture, respects property locally situated within the jurisdiction of a neutral State; but this exemption is referred to the right of the neutral State, not to any privilege which the situation gives to the hostile owner. Does reason, or the approved practice of nations, suggest any other exception?

With the Romans, who considered it lawful to enslave, or even to kill an enemy found within the territory of the State on the breaking out of war, it would very naturally follow that his property found in the same situation would become the spoil of the first taker. Grotius, whose great work on the laws of war and peace appeared in 1625, adopts as the basis of his opinion upon this question the rules of the Roman law, but qualifies them by the more humane sentiments which began to prevail in the intercourse of mankind at the time he wrote. In respect to debts, due to private persons, he considers the right to demand them as suspended only during the war, and reviving with the peace. Bynkershoek, who wrote about the year 1737, adopts the same rules, and follows them to all their consequences. He holds that, as no declaration of war to the enemy is necessary, no notice is necessary to legalize the capture of his property, unless he has, by express compact, reserved the right to withdraw it on the breaking out of hostilities. This rule he extends to things in action, as debts and credits, as well as to things in possession. He adduces, in confirmation of this doctrine, a variety of examples from the conduct of different States, embracing a period of something more than a century, beginning in the year 1556 and ending in 1657. But he acknowledges that the right had been questioned, and especially by the States-General of Holland; and he adduces no precedent of its exercise later than the year 1667, seventy years before his

publication. Against the ancient examples cited by him, there is the negative usage of the subsequent period of nearly a century and a half previously to the wars of the French revolution. During all this period, the only exception to be found is the case of the Silesian loan, in 1753. In the argument of the English civilians against the reprisals made by the King of Prussia in that case, on account of the capture of Prussian vessels by the cruisers of Great Britain, it is stated that "it would not be easy to find an instance where a prince had thought fit to make reprisals upon a debt due from himself to private men. There is a confidence that this will not be done. A private man lends money to a prince upon an engagement of honour; because a prince cannot be compelled, like other men, by a court of justice. So scrupulously did England and France adhere to this public faith, that even during the war" (alluding to the war terminated by the peace of Aix-la-Chapelle), "they suffered no inquiry to be made whether any part of the public debt was due to the subjects of the enemy, though it is certain many English had money in the French funds, and many French had money in ours" (*d*).

§ 299. Opinion of Vattel.

Vattel, who wrote about twenty years after Bynkershoek, after laying down the general principle, that the property of the enemy is liable to seizure and confiscation, qualifies it by the exception of real property (*les immeubles*) held by the enemy's subjects within the belligerent State, which having been acquired by the consent of the sovereign, is to be considered as on the same footing with the property of his own subjects, and not liable to confiscation *jure belli*. But he adds that the rents and profits may be sequestrated, in order to prevent their being remitted to the enemy. As to debts, and other things in action, he holds that war gives the same right to them as to the other property belonging to the enemy. He then quotes the example referred to by Grotius, of the hundred talents due by the Thebans to the Thessa-

(*d*) Grotius, de Jur. Bel. ac Pac. lib. iii. cap. 20, § 16. Bynkershoek, Quæst. Jur. Pub. lib. i. cap. 2, 7. Letters of Camillus, by A. Hamilton, No. 20.

Vattel calls the report of the English civilians "un excellent morceau de droit des gens (liv. ii. ch. 7, § 34, Note *a*); and Montesquieu terms it "une réponse sans réplique." Œuvres, tom. vi. p. 445.

lians, of which Alexander had become master by right of conquest, but which he remitted to the Thessalians as an act of favour; and proceeds to state, that the "sovereign has naturally the same right over what his subjects may be indebted to the enemy; therefore he may confiscate debts of this nature, if the term of payment happen in time of war, or at least he may prohibit his subjects from paying while the war lasts. But at present, the advantage and safety of commerce have induced all the sovereigns of Europe to relax from this rigour. And as this custom has been generally received, he who should act contrary to it would injure the public faith; since foreigners have confided in his subjects only in the firm persuasion that the general usage would be observed. The State does not even touch the sums which it owes to the enemy; everywhere, in case of war, the funds confided to the public, are exempt from seizure and confiscation." In another passage, Vattel gives the reason of this exemption. "In reprisals, the property of subjects is seized, as well as that belonging to the sovereign or State. Every thing which belongs to the nation is liable to reprisals as soon as it can be seized, provided it be not a deposit confided to the public faith. This deposit being found in our hands only on account of that confidence which the proprietor has reposed in our good faith, ought to be respected even in case of open war. Such is the usage in France, in England, and elsewhere, in respect to money placed by foreigners in the public funds." Again he says: "The sovereign declaring war can neither detain those subjects of the enemy who were within his dominions at the time of the declaration, nor their effects. They came into this country on the public faith; by permitting them to enter his territories, and continue there, he has tacitly promised them liberty and perfect security for their return. He ought, then, to allow them a reasonable time to retire with their effects, and if they remain beyond the time fixed, he may treat them as enemies; but only as enemies disarmed" (*e*).

§ 300. The modern rule.

It appears, then, to be the modern rule of international usage, that property of the enemy found within the territory

(*e*) Vattel, Droit des Gens, liv. ii. ch. 18, § 344; liv. iii. ch. 4, § 63; ch 5, §§ 73—77.

of the belligerent State, or debts due to his subjects by the government or individuals, at the commencement of hostilities, are not liable to be seized and confiscated as prize of war. This rule is frequently enforced by treaty stipulations, but unless it be thus enforced, it cannot be considered as an inflexible, though an established rule. "The rule," as it has been beautifully observed, "like other precepts of morality, of humanity, and even of wisdom, is addressed to the judgment of the sovereign—it is a guide which he follows or abandons at his will; and although it cannot be disregarded by him without obloquy, yet it may be disregarded. It is not an immutable rule of law, but depends on political considerations, which may continually vary" (*f*).

§ 301. Rule of reciprocity.

Among these considerations is the conduct observed by the enemy. If he confiscates property found within his territory, or debts due to our subjects on the breaking out of war, it would certainly be just, and it may, under certain circumstances, be politic, to retort upon his subjects by a similar proceeding. This principle of reciprocity operates in many cases of international law. It is stated by Sir W. Scott to be the constant practice of Great Britain, on the breaking out of war, to condemn property seized before the war, if the enemy condemns, and to restore if the enemy restores. "It is," says he, "a principle sanctioned by that great foundation of the law of England, Magna Charta itself, which prescribes, that, at the commencement of a war, the enemy's merchants shall be kept and treated as our own merchants are kept and treated in their country" (*g*). And it is also stated in the report of the English civilians, in 1753, before referred to, in order to enforce their argument that the King of Prussia could not justly extend his reprisals to the Silesian loan, that "French ships and effects, wrongfully taken, after the Spanish war, and before the French war, have, during the heat of the war with France, and since, been restored by sentence of your Majesty's courts to the French owners. No such ships or effects ever were attempted to be confiscated as enemy's property, here, during the war; because, had it not been for the

(*f*) Mr. Chief Justice Marshall, in *Brown* v. *United States*, 8 Cranch, 110.
(*g*) *The Santa Cruz*, 1 C. Rob. 64.

wrong first done, these effects would not have been in your Majesty's dominions."

§ 302. Droits of Admiralty.

The ancient law of England seems thus to have surpassed in liberality its modern practice. In the recent maritime wars commenced by that country, it has been the constant usage to seize and condemn as droits of admiralty the property of the enemy found in its ports at the breaking out of hostilities, and this practice does not appear to have been influenced by the corresponding conduct of the enemy in that respect. As has been observed by an English writer, commenting on the judgment of Sir W. Scott in the case of the Dutch ships, "there seems something of subtlety in the distinction between the virtual and the actual declaration of hostilities, and in the device of giving to the actual declaration a retrospective efficacy, in order to cover the defect of the virtual declaration previously implied" (*h*).

§ 303. Seizure of enemy's property found within the territorial limits of the belligerent State, on the declaration of war.

During the war between the United States and Great Britain, which commenced in 1812, it was determined by the Supreme Court, that the enemy's property, found within the territory of the United States on the declaration of war, could not be seized and condemned as prize of war, without some legislative act expressly authorising its confiscation. The court held that the law of Congress declaring war was not such an act. That declaration did not, by its own operation, so vest the property of the enemy in the government, as to support judicial proceedings for its seizure and confiscation. It vested only a right to confiscate, the assertion of which depended on the will of the sovereign power.

§ 304. *Brown* v. *United States.*

The judgment of the court stated, that the universal practice of forbearing to seize and confiscate debts and credits, the principle universally received, that the right to them revives on the restoration of peace, would seem to prove that war is not an absolute confiscation of this property, but that it simply confers the right of confiscation.

Between debts contracted under the faith of laws, and property acquired in the course of trade on the faith of the same laws, reason draws no distinction; and although, in practice, vessels with their cargoes found in port at the declaration of

(*h*) Chitty's Law of Nations, ch. 3, p. 80.

war may have been seized, it was not believed that modern usage would sanction the seizure of the goods of an enemy on land, which were acquired in peace in the course of trade. Such a proceeding was rare, and would be deemed a harsh exercise of the rights of war. But although the practice in this respect might not be uniform, that circumstance did not essentially affect the question. The inquiry was, whether such property vests in the sovereign by the mere declaration of war, or remains subject to a right of confiscation, the exercise of which depends upon the national will: and the rule which applies to one case, so far as respects the operation of a declaration of war on the thing itself, must apply to all others over which war gives an equal right. The right of the sovereign to confiscate debts being precisely the same with the right to confiscate other property found in the country, the operation of a declaration of war on debts, and on other property found within the country must be the same.

Even Bynkershoek, who maintains the broad principle, that in war every thing done against an enemy is lawful; that he may be destroyed, though unarmed and defenceless; that fraud, or even poison, may be employed against him; that a most unlimited right is acquired to his person and property; admits that war does not transfer to the sovereign a debt due to his enemy; and, therefore, if payment of such debt be not exacted, peace revives the former right of the creditor; "because," he says, "the occupation which is had by war consists more in fact than in law." He adds to his observations on this subject: "Let it not, however, be supposed that it is only true of actions that they are not condemned *ipso jure*, for other things also belonging to the enemy may be concealed and escape confiscation" (*i*).

(*i*) "Quod dixi de actionibus recte publicandis, ita demum obtinet, si quod subditi nostri hostibus nostris debent, princeps a subditis suis reverà exegerit. Si exegerit, rectè solutum est, si non exegerit, pace factâ reviviscit jus pristinum creditoris, quia occupatio, quæ bello fit, magis in facto, quam in potestate juris consistit. Nomina igitur, non exacta tempore belli quodammodo intermori videntur, sed per pacem, genere quodam postliminii, ad priorem dominum reverti. Secundum hæc inter gentes ferè convenit, ut nominibus bello publicatis, pace deinde factâ, exacta censeantur periisse, et maneant extincta, non autem exacta reviviscant, et restituantur veris creditoribus. . . . . Noli autem existimare, de actionibus duntaxat verum esse, eas ipso jure non publicari, nam nec alia quæq ie publicantur, quæ apud hostes, sunt et ibi fortè celantur. Unde et ea, quæ apud hostes ante bellum exortum habebamus, indictoque bella suppressa erant, atque ita non publicata,

Vattel says, that "the sovereign can neither detain the persons nor the property of those subjects of the enemy, who are within his dominions at the time of the declaration."

It was true that this rule was, in terms, applied by Vattel to the property of those only who are personally within the territory at the commencement of hostilities; but it applied equally to things in action and to things in possession; and if war did, of itself, without any further exercise of the sovereign will, vest the property of the enemy in the sovereign, the presence of the owner could not exempt it from this operation of war. Nor could a reason be perceived for maintaining that the public faith is more entirely pledged for the security of property, trusted in the territory of the nation in time of peace, if it be accompanied by its owner, than if it be confided to the care of others.

The modern rule, then, would seem to be, that tangible property belonging to an enemy, and found in the country at the commencement of war, ought not to be immediately confiscated; and in almost every commercial treaty an article is inserted, stipulating for the right to withdraw such property.

This rule appeared to be totally incompatible with the idea, that war does, of itself, vest the property in the belligerent government. It might be considered as the opinion of all who have written on the *jus belli*, that war gives the right to confiscate, but does not itself confiscate, the property of the enemy; and the rules laid down by these writers went to the exercise of this right.

The Constitution of the United States was framed at a time when this rule, introduced by commerce in favour of moderation and humanity, was received throughout the civilized world. In expounding that Constitution, a construction ought not lightly to be admitted, which would give to a declaration of war an effect in this country it did not possess elsewhere, and which would fetter the exercise of that entire discretion respecting enemy's property, which might enable the government to apply to the enemy the rule which he applied to us.

This general reasoning would be found to be much

si a nostris denuo recuperentur, non fieri recuperantium, sed pristinis dominis restitui, rectè responsum est. Consil. Belg. t. iii. Consil. 67." Bynkershock, Quæst. Jur. Pub. lib. i. cap. vii.

strengthened by the words of the Constitution itself—That the declaration of war had only the effect of placing the two nations in a state of hostility, of producing a state of war, of giving those rights which war confers; but not of operating, by its own force, any of those results—such as a transfer of property—which are usually produced by ulterior measures of government, was fairly deducible from the enumeration of powers which accompanied that of declaring war:—"Congress shall have power to declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water."

It would be restraining this clause within narrower limits than the words themselves import, to say that the power to make rules concerning captures on land and water was to be confined to captures which are extraterritorial. If it extended to rules respecting enemy's property found within the territory, then the Court perceived an express grant to Congress of the power in question as an independent substantive power, not included in that of declaring war.

The acts of Congress furnished many instances of an opinion, that the declaration of war does not, of itself, authorize proceedings against the persons or property of the enemy, found at the time within the territory.

War gives an equal right over persons and property; and if its declaration was not considered as prescribing a law respecting the person of an enemy found in our country, neither did it prescribe a law for his property. The act concerning alien enemies, which conferred on the President very great discretionary powers respecting their persons, afforded a strong implication that he did not possess those powers by virtue of the declaration of war.

The act "for the safe keeping and accommodation of prisoners of war," was of the same character.

The act prohibiting trade with the enemy contained this clause:—"That the President of the United States be, and he is hereby authorized to give, at any time within six months after the passage of this act, passports for the safe transportation of any ship or other property belonging to British subjects, and which is now within the limits of the United States."

The phraseology of this law showed that the property of a British subject was not considered by the legislature as being vested in the United States by the declaration of war; and the authority which the act conferred on the President was manifestly considered as one which he did not previously possess.

The proposition that a declaration of war does not, in itself, enact a confiscation of the property of the enemy within the territory of the belligerent, was believed to be entirely free from doubt. Was there in the Act of Congress, by which war was declared against Great Britain, any expression which would indicate such an intention?

That act, after placing the two nations in a state of war, authorizes the President to use the whole land and naval force of the United States, to carry the war into effect; and "to issue to private armed vessels of the United States commissions, or letters of marque and general reprisal, against the vessels, goods, and effects of the government of the United Kingdom of Great Britain and Ireland, and the subjects thereof."

That reprisals may be made on enemy's property found within the United States at the declaration of war, if such be the will of the nation, had been admitted; but it was not admitted that, in the declaration of war, the nation had expressed its will to that effect.

It could not be necessary to employ argument in showing, that when the Attorney for the United States institutes proceedings at law for the confiscation of enemy's property found on land, or floating in one of our creeks, in the care and custody of one of our citizens, he is not acting under the authority of letters of marque and reprisal, still less under the authority of such letters issued to a private armed vessel.

The act "concerning letters of marque, prizes, and prize goods," certainly contained nothing to authorize that seizure.

There being no other Act of Congress which bore upon the subject, it was considered as proved that the legislature had not confiscated enemy's property, which was within the United States at the declaration of war, and that the sentence of

condemnation, pronounced in the Court below, could not be sustained.

One view, however, had been taken of this subject, which deserved to be further considered. It was urged that, in executing the laws of war, the executive may seize and the courts condemn all property which, according to the modern law of nations, is subject to confiscation; although it might require an act of the legislature to justify the condemnation of that property, which, according to modern usage, ought not to be confiscated.

This argument must assume for its basis that modern usage constitutes a rule which acts directly upon the thing itself, by its own force, and not through the sovereign power. This position was not allowed. This usage was a guide which the sovereign follows or abandons at his will. The rule, like other precepts of morality, of humanity, and even of wisdom, was addressed to the judgment of the sovereign; and although it could not be disregarded by him without obloquy, yet it might be disregarded.

The rule was, in its nature, flexible. It was subject to infinite modifications. It was not an immutable rule of law, but depended on political considerations, which might continually vary. Commercial nations, in the situation of the United States, had always a considerable quantity of property in the possession of their neighbours. When war breaks out, the question, what shall be done with enemy's property in our country, is a question rather of policy than of law. The rule which we apply to the property of our enemy, will be applied by him to the property of our citizens. Like all other questions of policy, it was proper for the consideration of a department which can modify it at will; not for the consideration of a department which can pursue only the law as it is written. It was proper for the consideration of the legislature, not of the executive or judiciary. It appeared to the Court that the power of confiscating enemy's property was in the legislature, and that the legislature had not yet declared its will to confiscate property which was within our territory at the declaration of war (*k*).

(*k*) Mr. Chief Justice Marshall, in *Brown* v. *United States*, 8 Cranch, 123–129.

§ 304a. Practice of the Crimean War.

On the outbreak of the Crimean war, Russia permitted Turkish vessels to leave her ports on the ground that a similar indulgence had been granted to Russian vessels by Turkey. When England and France took part in the war, they allowed Russian vessels in their ports six weeks to complete their cargoes and depart. This exemption from the effects of the war was afterwards extended to all Russian ships that put to sea before the 15th of May, 1854. Russia also allowed English and French vessels a period of six weeks for departure, and for vessels in the White Sea the period of six weeks commenced from the date when the navigation was opened (*l*).

§ 305. Debts due to the enemy.

In respect to debts due to an enemy, previously to the commencement of hostilities, the law of Great Britain pursues a policy of a more liberal, or at least of a wiser character, than in respect to droits of admiralty. A maritime power, which has an overwhelming naval superiority, may have an interest, or may suppose it has an interest, in asserting the right of confiscating enemy's property, seized before an actual declaration of war; but a nation which, by the extent of its capital, must generally be the creditor of every other commercial country, can certainly have no interest in confiscating debts due to an enemy, since that enemy might, in almost every instance, retaliate with much more injurious effect. Hence, though the prerogative of confiscating such debts, and compelling their payment to the crown, still theoretically exists, it is seldom or never practically exerted. The right of the original creditor to sue for the recovery of the debt is not extinguished; it is only suspended during the war, and revives, in full force, on the restoration of peace (*m*).

§ 306. Practice of the United States.

Such, too, is the law and practice of the United States. The debts due by American citizens to British subjects before the war of the Revolution, and not actually confiscated, were judicially considered as revived, together with the right to sue for their recovery on the restoration of peace between the two countries. The impediments which had existed to the collection of British debts, under the local laws of the different States of the Confederation, were stipulated to be removed by the treaty of peace, in 1783; but this stipulation proving ineffectual for the complete indemnification of the

(*l*) [Calvo, vol. ii. § 725, p. 41].

(*m*) *Furtado* v. *Rogers*, 3 Bos. & Pul. 191; *Ex parte Boussmaker*, 12 Ves. 71; *The Nuestra Signora de los dolores*, Edw. Ad. 60.

creditors, the controversy between the two countries on this subject was finally adjusted, by the payment of a sum *en bloc* by the government of the United States, for the use of the British creditors. The commercial treaty of 1794 also contained an express declaration, that it was unjust and impolitic that private contracts should be impaired by national differences; with a mutual stipulation, that "neither the debts due from individuals of the one nation to individuals of the other, nor shares, nor moneys which they may have in the public funds, or in the public or private banks, shall ever, in any event of war, or national differences, be sequestered or confiscated" (*n*).

§ 307. Of England and France.

On the commencement of hostilities between France and Great Britain, in 1793, the former power sequestrated the debts and other property belonging to the subjects of her enemy, which decree was retaliated by a countervailing measure on the part of the British government. By the additional articles to the treaty of peace between the two powers, concluded at Paris, in April, 1814, the sequestrations were removed on both sides, and commissaries were appointed to liquidate the claims of British subjects for the value of their property unduly confiscated by the French authorities, and also for the total or partial loss of the debts due to them, or other property unduly retained under sequestration, subsequently to 1792. The engagement thus extorted from France may be considered as a severe application of the rights of conquest to a fallen enemy, rather than a measure of even-handed justice; since it does not appear that French property, seized in the ports of Great Britain and at sea, in anticipation of hostilities, and subsequently condemned as droits of admiralty, was restored to the original owners under this treaty, on the return of peace between the two countries (*o*).

§ 308. Of England and Denmark.

So, also, on the rupture between Great Britain and Denmark, in 1807, the Danish ships and other property, which had been seized in the British ports and on the high seas, before the actual declaration of hostilities, were condemned as

(*n*) Dallas's Rep. vol. iii. pp. 4, 5, 199—285.
(*o*) Martens, Nouveau Recueil, tom. ii. p. 16.

droits of admiralty by the retrospective operation of the declaration. The Danish government issued an ordinance, retaliating this seizure by sequestrating all debts due from Danish to British subjects, and causing them to be paid into the Danish royal treasury. The English Court of King's Bench determined that this ordinance was not a legal defence to a suit in England for such a debt, not being conformable to the usage of nations; the text writers having condemned the practice, and no instance having occurred of the exercise of the right, except the ordinance in question, for upwards of a century. The soundness of this judgment may well be questioned. It has been justly observed, that between debts contracted under the faith of laws, and property acquired on the faith of the same laws, reason draws no distinction; and the right of the sovereign to confiscate debts is precisely the same with the right to confiscate other property found within the country on the breaking out of the war. Both require some special act expressing the sovereign will, and both depend, not on any inflexible rule of international law, but on political considerations by which the judgment of the sovereign may be guided (*p*).

§ 308a. Public and private debts.

Some writers have drawn a distinction between debts due from a subject of one belligerent to a subject of the other, and debts due from a belligerent State to the subjects of the other. It is said that there exists a right to confiscate the former, while the latter are to be exempt. The Confederate States acted upon this distinction, and confiscated all property and all rights, credits, and interests held within the confederacy, by or for any alien enemy, except public stocks and securities. Lord Russell strongly protested against this as being an act as unusual as it was unjust (*q*). Many of the individual inhabitants of the South carried this principle further, and repudiated all their debts due to citizens of the Northern States (*r*). But this is the only instance in recent times of such measures having been adopted, and it is an example that seems unlikely to be imitated. The confiscation of private debts of any sort, besides exposing the State doing so to retaliation, only cripples the enemy in a very indirect way. It has no effect at all on the military or naval operations of the war, and cannot, therefore, be justified on any principle.

(*p*) *Wolff* v. *Oxholm*, 6 M. & S. 92; *Brown* v. *United States*, 8 Cranch, 110.

(*q*) [Parl. Papers, 1862. Correspondence relating to Civil War, p. 108].

(*r*) [Draper, Hist. of American Civil War, vol. i. p. 537].

§ 309. Trading with the enemy, unlawful on the part of subjects of the belligerent State.

One of the immediate consequences of the commencement of hostilities is, the interdiction of all commercial intercourse between the subjects of the States at war, without the license of their respective governments. In Sir W. Scott's judgment, in the case of *The Hoop*, this is stated to be a principle of universal law, and not peculiar to the maritime jurisprudence of England. It is laid down by Bynkershoek as a universal principle of law. "There can be no doubt," says that writer, "that, from the nature of war itself, all commercial intercourse ceases between enemies. Although there be no special interdiction of such intercourse, as is often the case, commerce is forbidden by the mere operation of the law of war. Declarations of war themselves sufficiently manifest it, for they enjoin on every subject to attack the subjects of the other prince, seize on their goods, and do them all the harm in their power. The utility, however, of merchants, and the mutual wants of nations, have almost got the better of the law of war, as to commerce. Hence it is alternately permitted and forbidden in time of war, as princes think it most for the interests of their subjects. A commercial nation is anxious to trade, and accommodates the laws of war to the greater or lesser want that it may be in of the goods of others. Thus, sometimes a mutual commerce is permitted generally; sometimes as to certain merchandises only, while others are prohibited; and sometimes it is prohibited altogether. But in whatever manner it may be permitted, whether generally or specially, it is always, in my opinion, so far a suspension of the laws of war; and in this manner there is partly war and partly peace between the subjects of both countries" (*s*).

It appears from these passages to have been the law of

(*s*) "Quamvis autem nulla specialis sit commerciorum prohibitio, ipso tamen jure belli commercia esse vetita, ipsæ indictiones bellorum satis declarant, quisque enim subditus jubetur alterius Principis subditos, eorumque bona aggredi, occupare, et quomodocumque iis nocere. Utilitas verò mercantium, et quòd alter populus alterius rebus indigeat, fere jus belli, quòd ad commercia, subegit. Hinc in quoque bello aliter atque aliter commercia permittuntur vetanturque, prout e re suâ subditorumque suorum esse censent Principes. Mercator populus studet commerciis frequentandis, et prout quisque alterius mercibus magis minusve carere potest, eò jus belli accomodat. Sic aliquando generaliter permittuntur mutua commercia, aliquando quòd ad certas merces, reliquis prohibitis, aliquando simpliciter et generaliter vetantur. Utcunque autem permittas, sive generaliter, sive specialiter, semper, si me audias, quoad hæc status belli suspenditur. Pro parte sic bellum, pro parte pax erit inter subditos utriusque Principis." Bynkershoek, Quæst. Jur. Pub. lib. i. cap. 3.

Holland. Valin states it to have been the law of France, whether the trade was attempted to be carried on in national or neutral vessels; and it appears from a case cited (in *The Hoop*) to have been the law of Spain; and it may without rashness be affirmed to be a general principle of law in most of the countries in Europe (*t*).

§ 310. *The Hoop.* Sir W. Scott proceeds to state two grounds upon which this sort of communication is forbidden. The first is, that "by the law and constitution of Great Britain the sovereign alone has the power of declaring war and peace. He alone, therefore, who has the power of entirely removing the state of war, has the power of removing it in part, by permitting, where he sees proper, that commercial intercourse which is a partial suspension of the war. There may be occasions on which such an intercourse may be highly expedient; but it is not for individuals to determine on the expediency of such occasions, on their own notions of commerce merely, and possibly on grounds of private advantage, not very reconcilable with the general interests of the State. It is for the State alone, on more enlarged views of policy, and of all the circumstances that may be connected with such an intercourse, to determine when it shall be permitted, and under what regulations. No principle ought to be held more sacred than that this intercourse cannot subsist on any other footing than that of the direct permission of the State. Who can be insensible to the consequences that might follow, if every person in time of war had a right to carry on a commercial intercourse with the enemy, and, under colour of that, had the means of carrying on any other species of intercourse he might think fit? The inconvenience to the public might be extreme; and where is the inconvenience on the other side, that the merchant should be compelled, in such a situation of the two countries, to carry on his trade between them (if necessary) under the eye and control of the government charged with the care of the public safety?

"Another principle of law, of a less politic nature, but equally general in its reception and direct in its application, forbids this sort of communication, as fundamentally incon-

(*t*) Valin, Comm. sur l'Ordonn. de la Marine, liv. iii. tit. 6, art. 3.

sistent with the relation existing between the two belligerent countries; and that is, the total inability to sustain any contract, by an appeal to the tribunals of the one country, on the part of the subjects of the other. In the law of almost every country, the character of alien enemy carries with it a disability to sue, or to sustain, in the language of the civilians, a *persona standi in judicio*. A state in which contracts cannot be enforced, cannot be a state of legal commerce. If the parties who are to contract have no right to compel the performance of the contract, nor even to appear in a court of justice for that purpose, can there be a stronger proof that the law imposes a legal inability to contract? To such transactions it gives no sanction; they have no legal existence; and the whole of such commerce is attempted without its protection, and against its authority. Bynkershoek expresses himself with force upon this argument, in his first book, Chapter VII., where he lays down that the legality of commerce and the mutual use of courts of justice are inseparable. He says that, in this respect, cases of commerce are undistinguishable from any other kinds of case: 'But if the enemy be once permitted to bring actions, it is difficult to distinguish from what causes they may arise; nor have I been able to observe that this distinction has ever been carried into practice.'"

Sir W. Scott then notices the constant current of decisions in the British Courts of Prize, where the rule had been rigidly enforced in cases where acts of parliament had, on different occasions, been made to relax the Navigation Law, and other revenue acts; where the government had authorized, under the sanction of an act of parliament, a homeward trade from the enemy's possessions, but had not specifically protected an outward trade to the same, though intimately connected with that homeward trade, and almost necessary to its existence; where strong claims, not merely of convenience, but of necessity, excused it on the part of the individual; where cargoes had been laden before the war, but the parties had not used all possible diligence to countermand the voyage, after the first notice of hostilities; and where it had been enforced, not only against British subjects, but also against those of its allies in the war, upon the supposition that the rule was founded upon a universal principle, which States allied in war

had a right to notice and apply mutually to each other's subjects.

Such, according to this eminent civilian, are the general principles of the rule under which the public law of Europe, and the municipal law of its different States, have interdicted all commerce with an enemy. It is thus sanctioned by the double authority of public and of private jurisprudence; and is founded both upon the sound and salutary principle forbidding all intercourse with an enemy, unless by permission of the sovereign or State, and upon the doctrine that he who is *hostis*—who has no *persona standi in judicio*, no means of enforcing contracts,—cannot make contracts, unless by such permission (*u*).

§ 311. Decisions of the American courts, as to trading with the public enemy.

The Rapid.

The same principles were applied by the American courts of justice to the intercourse of their citizens with the enemy, on the breaking out of the late war between the United States and Great Britain. A case occurred in which a citizen had purchased a quantity of goods within the British territory, a long time previous to the declaration of hostilities, and had deposited them on an island near the frontier; upon the breaking out of hostilities, his agents had hired a vessel to proceed to the place of deposit, and bring away the goods; on her return she was captured, and with the cargo, condemned as prize of war. It was contended for the claimant that this was not a trading, within the meaning of the cases cited to support the condemnation; that, on the breaking out of war, every citizen had a right, and it was the interest of the community to permit its members, to withdraw property purchased before the war, and lying in the enemy's country. But the Supreme Court determined, that whatever relaxation of the strict rights of war the more mitigated and mild practice of modern times might have established, there had been none on this subject. The universal sense of nations had acknowledged the demoralizing effects which would result from the admission of individual intercourse between the States at war. The whole nation is embarked in one common bottom, and must be reconciled to one common fate. Every individual of the one nation must acknowledge every individual of the other nation as his own

(*u*) *The Hoop*, 1 C. Rob. 196.

enemy, because he is the enemy of his country. This being the duty of the citizen, what is the consequence of a breach of that duty? The law of prize is a part of the law of nations. By it a hostile character is attached to trade, independent of the character of the trader who pursues or directs it. Condemnation to the captor is equally the fate of the enemy's property, and of that found engaged in an anti-neutral trade. But a citizen or ally may be engaged in a hostile trade, and thereby involve his property in the fate of those in whose cause he embarks. This liability of the property of a citizen to condemnation, as prize of war, may likewise be accounted for on other considerations. Every thing that issues from a hostile country is, *primâ facie*, the property of the enemy; and it is incumbent upon the claimant to support the negative of the proposition. But if the claimant be a citizen, or an ally, at the same time that he makes out his interest he confesses the commission of an offence, which, under a well-known rule of the municipal law, deprives him of his right to prosecute his claim. Nor did this doctrine rest upon abstract reasoning only; it was supported by the practice of the most enlightened, perhaps it might be said, of all commercial nations; and it afforded the Court full confidence in their judgment in this case, that they found, upon recurring to the records of the Court of Appeals in Prize Causes, established during the war of the Revolution, that, in various cases, it was reasoned upon as the established law of that Court. Certain it was, that it was the law of England before the American Revolution, and therefore formed a part of the admiralty and maritime jurisdiction conferred upon the United States Courts by their Federal Constitution. Whether the trading, in that case, was such as, in the eye of the prize law, subjects the property to capture and confiscation, depended on the legal force of the term. If by *trading*, in the law of prize, were meant that signification of the term which consists in negotiation or contract, the case would certainly not come under the penalty of the rule. But the object, policy, and spirit of the rule are intended to cut off all communication, or actual locomotive intercourse between individuals of the States at war. Negotiation or contract had, therefore, no necessary connection with the offence. Intercourse incon-

sistent with actual hostility, is the offence against which the rule is directed; and by substituting this term for that of *trading with the enemy*, an answer was given to the argument, that this was not a trading within the meaning of the cases cited. Whether, on the breaking out of war, a citizen has a right to remove to his own country, with his property, or not, the claimant certainly had not a right to leave his own country for the purpose of bringing home his property from an enemy's country. As to the claim for the vessel, it was held to be founded upon no pretext whatever; for the undertaking was altogether voluntary and inexcusable (*x*).

§ 312. *The Alexander.*

So where hostilities had broken out, and the vessel in question, with a full knowledge of the war, and unpressed by any peculiar danger, changed her course and sought an enemy's port, where she traded and took in a cargo, it was determined to be a cause of confiscation. If such an act could be justified, it would be in vain to prohibit trade with an enemy. The subsequent traffic in the enemy's country, by which her return cargo was obtained, connected itself with a voluntary sailing for a hostile port; nor did the circumstance that she was carried by force into one part of the enemy's dominions, when her actual destination was another, break the chain. The conduct of this ship was much less to be defended than that of *The Rapid* (*y*).

§ 313. *The St. Lawrence.*

So, also, where goods were purchased some time before the war, by the agent of an American citizen in Great Britain, but not shipped until nearly a year after the declaration of hostilities, they were pronounced liable to confiscation. Supposing a citizen had a right, on the breaking out of hostilities, to withdraw from the enemy's country his property, purchased before the war, (on which the Court gave no opinion,) such right must be exercised with due diligence, and within a reasonable time after a knowledge of hostilities. To admit a citizen to withdraw property from a hostile country a long time after the commencement of war, upon the pretext of its having been purchased before the war, would lead to the most injurious consequences, and hold out temptations to every species of fraudulent and illegal

(*x*) *The Rapid*, 8 Cranch, 155.
(*y*) *The Alexander*, Ibid., 169.

traffic with the enemy. To such an unlimited extent the right could not exist (z).

§ 313a. Quitting hostile territory at the outbreak of war.

In December, 1863, *The Gray Jacket* sailed from Mobile Bay, a Confederate port at that time blockaded by the Federal fleets, and the next day was captured on the high seas by a Federal cruiser. The owner of *The Gray Jacket* asserted that he was endeavouring to quit the rebel States with the ship and as much property as he could take in her, in order to repair to one of the loyal States. The court below, however, condemned the ship as prize. The Supreme Court, on appeal, said, the liability of the property was, irrespective of the *status domicilii*, guilt or innocence of the owner. If it came from enemy territory, it bore the impress of enemy property. If it belonged to a loyal citizen of the country of the captors, it was nevertheless as much liable to condemnation as if owned by a citizen or subject of the hostile country or by the hostile government itself. The only qualification of these rules is, that where, upon the breaking out of hostilities, or as soon after as possible, the owner escapes with such property as he can take with him, or in good faith thus early removes his property with a view of putting it beyond the dominion of the hostile power, the property in such cases is exempt from the liability which would otherwise attend it. *The Gray Jacket* having only sailed in December, 1863, whereas the war broke out in April, 1861, her removal was held to be too late and she was condemned as prize (a).

§ 314. *The Joseph*

In another case, the vessel, owned by citizens of the United States, sailed from thence before the war, with a cargo or freight, on a voyage to Liverpool and the north of Europe, and thence back to the United States. She arrived in Liverpool, there discharged her cargo, and took in another at Hull, and sailed for St. Petersburg under a British license, granted the 8th June, 1812, authorizing the export of mahogany to Russia, and the importation of a return cargo to England. On her arrival at St. Petersburg she received news of the war, and sailed to London with a Russian cargo, consigned to British merchants; wintered in Sweden, and, in the spring of 1813, sailed under convoy of a British man-of-war for England, where she arrived and delivered her cargo, and sailed for the United States in ballast, under a British license, and was captured near Boston lighthouse. The Court stated, in delivering its judgment, that, after the decisions above cited, it was not to be contended that the sailing with a cargo

(z) *The St. Lawrence*, 8 Cranch, 434; S. C. 9 Cranch, 120.
(a) [*The Gray Jacket*, 5 Wallace, 342, 369.]

or freight, from Russia to the enemy's country, after a full knowledge of the war, did not amount to such a trading with the enemy as to subject both vessel and cargo to condemnation, as prize of war, had they been captured whilst proceeding on that voyage. The alleged necessity of undertaking that voyage to enable the master, out of the freight, to discharge his expenses at St. Petersburg, countenanced, as the master declared, by the opinion of the United States minister there that, by undertaking such a voyage, he would violate no law of his own country; although those considerations, if founded in truth, presented a case of peculiar hardship, yet they afforded no legal excuse which it was competent for the Court to admit as the basis of its decision. The counsel for the claimant seemed to be aware of the insufficiency of this ground, and had applied their strength to show that the vessel was not taken *in delicto*, having finished the offensive voyage in which she was engaged in the enemy's country, and having been captured on her return home in ballast. It was not denied that, if she had been taken in the same voyage in which the offence was committed, she would be considered as still *in delicto*, and subject to confiscation; but it was contended that her voyage terminated at the enemy's port, and that she was on her return, on a new voyage. But the Court said, that even admitting that the outward and homeward voyage could be separated, so as to render them two distinct voyages, still, it could not be denied that the *termini* of the homeward voyage were St. Petersburg and the United States. The continuity of such a voyage could not be broken by a voluntary deviation of the master, for the purpose of carrying on an intermediate trade. That the going from the neutral to the enemy's country was not undertaken as a new voyage, was admitted by the claimants, who alleged that it was undertaken as subsidiary to the voyage home. It was, in short, a voyage from the neutral country, by the way of the enemy's country; and, consequently, the vessel, during any part of that voyage, if seized for any conduct subjecting her to confiscation as prize of war, was seized *in delicto* (*b*).

§ 315. Strictness of the rule

We have seen what is the rule of public and municipal law on this subject, and what are the sanctions by which it is

(*b*) *The Joseph*, 8 Cranch, 451.

guarded. Various attempts have been made to evade its operation, and to escape its penalties; but its inflexible rigour has defeated all these attempts. The apparent exceptions to the rule, far from weakening its force, confirm and strengthen it. They all resolve themselves into cases where the trading was with a neutral, or the circumstances were considered as implying a license, or the trading was not consummated until the enemy had ceased to be such. In all other cases, an express license from the government is held to be necessary to legalize commercial intercourse with the enemy (*c*).

§ 315 a. Relaxation of rules against trade with the enemy.

These principles are still applicable to war except when belligerents have, of their own accord, chosen to modify them by regulations for the guidance of their subjects in any particular case. During the Crimean war England, France and Russia, all permitted their respective subjects to trade with the enemy, provided the trade was carried on through the medium of a neutral flag (*d*). This relaxation of the rules of international law only applied to that particular war. England at the same time prohibited her subjects from dealing with any securities issued by the Russian Government during the war. Such an act was made a misdemeanour (*e*). At the outbreak of the Franco-German war, France permitted German vessels that had left Germany before the declaration of war, and were destined to carry goods to French ports, to proceed to such ports and discharge the goods, but German vessels which, under the same circumstances, were destined for neutral ports were held to be liable to capture as prize (*f*).

§ 315 b. Extent of prohibition of intercourse between enemies.

The law of nations prohibits all intercourse between subjects of the two belligerents which is inconsistent with the state of war between their countries. This includes any act of voluntary submission to the enemy, or receiving his protection; any act or contract which tends to increase his resources, and every kind of trading or commercial dealing or intercourse, whether by transmissions of money or goods, or orders for the delivery of either, between the two countries directly or indirectly, or through the intervention of third persons or partnerships, or by contracts in any form looking to, or involving such transmission, or by insurances upon trade by or with the enemy. Beyond this the prohibition does not extend (*g*). It does not apply to transactions which are to take place entirely in the territory of one belligerent. Thus where a creditor residing in one of the States at war, has an agent in the other

(*c*) *The Franklin*, 6 C. Rob. 127; *The Madonna della Gracia*, 4 C. Rob. 195; *The Juffrow Catharina*, 5 C. Rob. 141; *The Alby*, Ibid., 251. See Wheaton's Reports, vol. ii., App., note i. p. 34. Wheaton on Captures, 220. [*Mitchell* v. *U. S.* 21 Wallace, 350; *Radich* v. *Hutchins*, 5 Otto, 210.]

(*d*) [Kent by Abdy (2nd ed.), p. 190.]

(*e*) [17 & 18 Vict. c. 123.]

(*f*) [Archives Diplomatiques, 1871—2, Pt. I. pp. 246, 251.]

(*g*) [*Kershaw* v. *Kelsey*, 100 Massachusetts, 572; *Jecker* v. *Montgomery*, 18 Howard, 111; *Hanger* v. *Abbott*, 6 Wallace, 535; *Montgomery* v. *U. S.*, 15 Ibid., 395; *Snell* v. *Dwight*, 120 Massachusetts, 9.]

State, to whom a debtor could pay the money, which agent was appointed before the war broke out, the payment by the debtor to such agent is lawful. It does not follow that the agent, if he receives the money, will violate the law by remitting it to his principal (*h*).

Debts between enemies.

If a debt between enemies is contracted during the war, it cannot be sued for when the war is over (*i*); but when debts have been contracted before war breaks out, the existence of the war does not extinguish the debts, it simply suspends the remedy of the creditor (*k*). If the debts are not confiscated during the war, the right to enforce payment revives with peace (*l*). As the creditor cannot sue for his debt during the war, it has recently been held in America that a statute of limitations does not run against the creditor while the war lasts (*m*). In a case where the parties had agreed in their contract that no suit or action should be sustainable unless commenced within twelve months after a certain event should occur, the Court held, that as this contract was followed by a war, by which the parties became enemies, the plaintiff was relieved from his disability to sue within the twelve months (*n*).

§ 315 c. Contracts with neutrals to be performed in enemy's country. *The Teutonia.*

Another result of war is, that a contract between a belligerent subject and a neutral cannot, so long as the war lasts, be performed if the belligerent subject has agreed to carry it out in the enemy's country. Before the outbreak of the war between France and Germany in 1870, a German vessel was chartered by a British subject to carry a cargo of nitrate of soda (contraband of war) from Pisagua to Cork, Cowes, or Falmouth, and then to receive orders to proceed to any safe port in Great Britain, or on the continent between Havre and Hamburgh. On arriving at Falmouth the master received orders to go to Dunkirk, and started for that port. Shortly before arriving there, he was told by a French pilot that war had broken out between France and Germany, and thereupon he sailed to Dover to obtain accurate information. He had appeared off Dunkirk on the 16th of July, 1870, and war was actually declared on the 19th. At Dover he refused to give up the cargo unless the freight was paid. The ship was therefore sued by the consignees of the cargo. The Privy Council held that he was justified in putting back to Dover, and had been guilty of no improper delay or deviation from the voyage. As war was declared, his vessel being German, could not go to Dunkirk, and he was therefore not bound to carry out his contract in that respect. In this particular case the Court allowed the master the freight from Pisagua to Dover, because Dunkirk was not the only port stipulated for in the charter party, and delivery at Dover was within the terms of the contract. They declined to decide whether the freight would have been earned if no other port but Dunkirk had been mentioned (*o*).

(*h*) [*Ward* v. *Smith*, 7 Wallace, 452; *U. S.* v. *Grossmayer*, 9 Ibid., 75.]
(*i*) [*Willison* v. *Paterson*, 7 Taunton, 439.]
(*k*) [*Ware* v. *Hilton*, 3 Dallas, 199. Upton, Maritime Law, p. 42.]
(*l*) [Manning, by Amos (ed. 1875), p. 176. *Hanger* v. *Abbott*, 6 Wallace, 537.]
(*m*) [*Hanger* v. *Abbott*, 6 Wallace, 532; *The Protector*, 9 Ibid., 687; *U. S.* v. *Wiley*, 11 Ibid., 508.]
(*n*) [*Semmes* v. *Hartford Ins. Co.*, 13 Wallace, 158.]
(*o*) [*The Teutonia*, L. R. 4 P. C. 171. See also *The San Roman*, L. R. 3 A. & E. 583; *The Express*, Ibid., 597; *The Patria*, Ibid., 436.]

§ 316. Trade with the common enemy unlawful on the part of allied subjects.

Not only is such intercourse with the enemy, on the part of subjects of the belligerent State, prohibited and punished with confiscation in the Prize Courts of their own country, but, during a conjoint war, no subject of an ally can trade with the common enemy, without being liable to the forfeiture, in the Prize Courts of the ally, of his property engaged in such trade. This rule is a corollary of the other; and is founded upon the principle, that such trade is forbidden to the subjects of the co-belligerent by the municipal law of his own country, by the universal law of nations, and by the express or implied terms of the treaty of alliance subsisting between the allied powers. And as the former rule can be relaxed only by the permission of the sovereign power of the State, so this can be relaxed only by the permission of the allied nations, according to their mutual agreement. A declaration of hostilities naturally carries with it an interdiction of all commercial intercourse. Where one State only is at war, this interdiction may be relaxed, as to its own subjects, without injuring any other State; but when allied nations are pursuing a common cause against a common enemy, there is an implied, if not an express contract, that neither of the co-belligerent States shall do any thing to defeat the common object. If one State allows its subjects to carry on an uninterrupted trade with the enemy, the consequence will be, that it will supply aid and comfort to the enemy, which may be injurious to the common cause. It should seem that it is not enough, therefore, to satisfy the Prize Court of one of the allied States, to say that the other has allowed this practice to its own subjects; it should also be shown, either that the practice is of such a nature as cannot interfere with the common operations, or that it has the allowance of the other confederate State (*p*).

§ 317. Contracts with the enemy prohibited.

It follows as a corollary from the principle, interdicting all commercial and other pacific intercourse with the public enemy, that every species of private contract made with his subjects during the war is unlawful. The rule thus deduced is applicable to insurance on enemy's property and trade; to the drawing and negotiating of bills of exchange between

(*p*) Bynkershoek, Quæst. Jur. Pub. lib. i. cap. 10. *The Neptunus*, 6 C. Rob. 403; 4 Ibid., 251.

subjects of the powers at war; to the remission of funds, in money or bills, to the enemy's country; to commercial partnerships entered into between the subjects of the two countries, after the declaration of war, or existing previous to the declaration; which last are dissolved by the mere force and act of the war itself, although, as to other contracts, it only suspends the remedy (*q*).

§ 318. Persons domiciled in the enemy's country liable to reprisals.

Grotius, in the second chapter of his third book, where he is treating of the liability of the property of subjects for the injuries committed by the State to other communities, lays down that "by the law of nations, all the subjects of the offending State, who are such from a permanent cause, whether natives, or emigrants from another country, are liable to reprisals, but not so those who are only travelling or sojourning for a little time;—for reprisals," says he, "have been introduced as a species of charge imposed in order to pay the debts of the public; from which are exempt those who are only temporarily subject to the laws. Ambassadors and their goods are, however, excepted from this liability of subjects, but not those sent to an enemy." In the fourth chapter of the same book, where he is treating of the right of killing and doing other bodily harm to enemies, in what he calls *solemn war*, he holds that this right extends, "not only to those who bear arms, or are subjects of the author of the war, but to all those who are found within the enemy's territory. In fact, as we have reason to fear the hostile intentions even of strangers who are within the enemy's territory at the time, that is sufficient to render the right of which we are speaking applicable even to them in a general war. In which respect there is a distinction between war and reprisals, which last, as we have seen, are a kind of contribution paid by the subjects for the debts of the State" (*r*).

(*q*) Bynkershoek, Quæst. Jur. Pub. lib. i. cap. 21. Duponceau's Transl. p. 165, Note. Kent's Commentaries on American Law, vol. i. pp. 67, 68, 5th ed. [*Griswold* v. *Waddington*, 16 Johnson, 438; *Esposito* v. *Bowden*, 7 E. & B. 785; *The William Bagaley*, 5 Wallace, 377.]

(*r*) "Cæterùm non minus in hâc materiâ quàm in aliis cavendum est, ne confundamus ea quæ juris gentium sunt proprie, et ea quæ jure civili aut pactis populorum constituuntur.

"Jure gentium subjacent pignorationi omnes subditi injuriam facientes, qui tales sunt ex causâ permanente, sive indigenæ, sive advenæ, non qui transeundi aut moræ exiguæ causâ alicubi sunt. Introductæ enim sunt pig-

§ 319. Criticism of Barbeyrac.

Barbeyrac, in a note collating these passages, observes, that "the late M. Cocceius, in a dissertation which I have already cited, De Jure Belli in Amicos, rejects this distinction, and insists that even those foreigners who have not been allowed time to retire ought to be considered as adhering to the enemy, and for that reason justly exposed to acts of hostility. In order to supply this pretended defect, he afterwards distinguishes foreigners who remain in the country, from those who only transiently pass through it, and are constrained by sickness or the necessity of their affairs. But this is alone sufficient to show that, in this place, as in many others, he criticized our author without understanding him. In the following paragraph, Grotius manifestly distinguishes from the foreigners of whom he has just spoken those who are permanent subjects of the enemy, by whom he doubtless understands, as the learned Gronovius has already explained, those who are *domiciled* in the country. Our author explains his own meaning in the second chapter of this book, in speaking of reprisals, which he allows against this species of foreigners, whilst he does not grant them against those who only pass through the country, or are temporarily resident in it" (*s*).

Whatever may be the extent of the claims of a man's native country upon his political allegiance, there can be no doubt that the natural-born subject of one country may become the citizen of another, in time of peace, for the purposes of trade,

nationes ad exemplum onerum, quæ pro exsolvendis debitis publicis inducuntur, quorum immunes sunt qui tantùm pro tempore loci legibus subsunt. A numero tamen subditorum jure gentium excipiuntur legati, non ad hostes nostros missi, et res eorum." Grotius, de Jur. Bel. ac Pac. lib. iii. cap. ii. § 7, No. 1.

"Latè autem patet hoc jus licentiæ, nam primùm non eos tantum comprehendit qui actu ipso arma gerunt, aut qui bellum moventis subditi sunt, sed omnes etiam qui intra fines sunt hostiles: quod apertum fit ex ipsâ formulâ apud Livium, *Hostis sit ille, quique intra præsidia ejus sunt;* nimirùm quia ab illis quoque damnum metui potest, quod in bello continuo et universali sufficit ut locum habeat jus de quo agimus: aliter quàm in pignorationibus, quæ, ut diximus, ad exemplum onerum impositorum ad luenda civitatis debita, introductæ sunt: quare mirum non est, si, quod Baldus notat, multò plus licentiæ sit in bello quàm in pignorandi jure. Et hoc quidem quod dixi in peregrinis, qui commisso cognitoque bello intra fines hosticos veniunt, dubitationem non habet.

"At qui ante bellum eo iverant, videntur jure gentium pro hostibus haberi, post modicum tempus intra quod discedere potuerunt." Ibid. lib. iii. cap. iv. §§ 6—7.

(*s*) Grotius, par Barbeyrac, *in loc.* [See on this point Whiting, War Powers under the Constitution of the United States (43rd ed.), p. 334.]

and may become entitled to all the commercial privileges attached to his acquired domicile. On the other hand, if war breaks out between his adopted country and his native country, or any other, his property becomes liable to reprisals in the same manner as the effects of those who owe a permanent allegiance to the enemy State.

§ 320. Species of residence constituting domicile.

As to what species of residence constitutes such a domicile as will render the party liable to reprisals, the text writers are deficient in definitions and details. Their defects are supplied by the precedents furnished by the British Prize Courts, which, if they have not applied the principle with undue severity in the case of neutrals, have certainly not mitigated it in its application to that of British subjects resident in the enemy's country on the commencement of hostilities.

§ 321. *The St. Eustatius.*

In the judgment of the Lords of Appeal in Prize Causes, upon the cases arising out of the capture of *St. Eustatius* by Admiral Rodney, delivered in 1785, by Lord Camden, he stated that "if a man went into a foreign country upon a visit, to travel for health, to settle a particular business, or the like, he thought it would be hard to seize upon his goods; but a residence, not attended with these circumstances, ought to be considered as a permanent residence." In applying the evidence and the law to the resident foreigners in St. Eustatius, he said, that " in every point of view, they ought to be considered resident subjects. Their persons, their lives, their industry, were employed for the benefit of the State under whose protection they lived; and if war broke out, they continuing to reside there, paid their proportion of taxes, imposts, and the like, equally with natural-born subjects, and no doubt come within that description " (*t*).

§ 322. *The Harmony.*

" Time," says Sir W. Scott, "is the grand ingredient in constituting domicile. In most cases it is unavoidably conclusive. It is not unfrequently said that if a person comes only for a special purpose, that shall not fix a domicile. This is not to be taken in an unqualified latitude, and without some respect to the time which such a purpose may or shall occupy;

(*t*) M.S. Proceedings of the Commissioners under the Treaty of 1794, between Great Britain and the United States. Opinion of Mr. W. Pinkney, in the case of *The Betsey*.

for if the purpose be of such a nature as *may probably*, or *does actually*, detain the person for a great length of time, a general residence might grow upon the special purpose. A special purpose may lead a man to a country, where it shall detain him the whole of his life. Against such a long residence, the plea of an original special purpose could not be averred; it must be inferred in such a case, that other purposes forced themselves upon him, and mixed themselves with the original design, and impressed upon him the character of the country where he resided. Supposing a man comes into a belligerent country at or before the beginning of the war, it is certainly reasonable not to bind him too soon to an acquired character, and to allow him a fair time to disentangle himself; but if he continues to reside during a good part of the war, contributing by the payment of taxes and other means to the strength of that country, he could not plead his special purpose with any effect against the rights of hostility. If he could, there would be no sufficient guard against the frauds and abuses of masked, pretended, original, and sole purposes of a long-continued residence. There is a time which will estop such a plea; no rule can fix the time *à priori*, but such a rule there *must* be. In proof of the efficacy of mere time, it is not impertinent to remark that the same quantity of business, which would not fix a domicile in a certain quantity of time, would nevertheless have that effect if distributed over a larger space of time. This matter is to be taken in the compound ratio of the time and the occupation, with a great preponderance on the article of time: be the occupation what it may, it cannot happen, with but few exceptions, that mere length of time shall not constitute a domicile" (*u*).

§ 323. *The Indian Chief.*

In the case of *The Indian Chief*, determined in 1800, Mr. Johnson, a citizen of the United States, domiciled in England, had engaged in a mercantile enterprise to the British East Indies, a trade prohibited to British subjects, but allowed to American citizens under the commercial treaty of 1794, between the United States and Great Britain. The vessel came into a British port on its return voyage, and was seized as engaged in illicit trade. Mr. Johnson, having then left England, was determined not to be a British subject at the

(*u*) *The Harmony*, 2 C. Rob. 324.

time of capture, and restitution was decreed. In delivering his judgment in this case, Sir W. Scott said, "Taking it to be clear that the national character of Mr. Johnson, as a British merchant, was founded in residence only, that it was acquired by residence, and rested on that circumstance alone, it must be held, that, from the moment he turned his back on the country where he had resided, on his way to his own country, he was in the act of resuming his original character, and must be considered as an American. The character that is gained by residence, ceases by non-residence. It is an adventitious character, and no longer adheres to him from the moment that he puts himself in motion, *bonâ fide*, to quit the country, *sine animo revertendi*" (*x*).

§ 324. The native character easily reverts.

The native character easily reverts, and it requires fewer circumstances to constitute domicile, in the case of a native subject, than to impress the national character on one who is originally of another country. Thus, the property of a Frenchman who had been residing, and was probably naturalized, in the United States, but who had returned to St. Domingo, and shipped from thence the produce of that island to France, was condemned in the High Court of Admiralty (*y*).

In *The Indian Chief*, the case of Mr. Dutilth is referred to by the claimant's counsel, as having obtained restitution, though *at the time of sailing* he was resident in the enemy's country: but the decision of the Lords of Appeal, in 1800, is mentioned by Sir C. Robinson, in which different portions of Mr. Dutilth's property were condemned or restored, according to the circumstances of his residence at the time of capture. That decision is more particularly stated by Sir J. Nicholl, at the hearing of the case of *The Harmony* before the Lords, July 7, 1803. "The case of Mr. Dutilth also illustrates the present. He came to Europe about the end of July, 1793, at the time when there was a great deal of alarm on account of the state of commerce. He went to Holland, then not only in a state of amity, but of alliance with this country; he continued there until the French entered. During the whole time he was there, he was without any establishment; he had

(*x*) *The Indian Chief*, 3 C. Rob. 12.

(*y*) *La Virginie*, 5 C. Rob. 99. The same rule is also adopted in the prize law of France, Code des Prises, tom. i. pp. 92, 139, 303, and by the American Prize Courts. *The Dos Hermanos*, 2 Wheaton, 76.

no counting-house; he had no contracts or dealings with contractors there; he employed merchants there to sell his property, paying them a commission. Upon the French entering into Holland, he applied for advice to know what was left for him to do under the circumstances, having remained there on account of the doubtful state of mercantile credit, which not only affected Dutch and American, but English houses, who were all looking after the state of credit in that country. In 1794, when the French came there, Mr. D. applied to Mr. Adams, the American minister, who advised him to stay until he could get a passport. He continued there until the latter end of that year, and, having wound up his concerns, came away. Some part of his property was captured before he came there. That part which was taken before he came there was restored to him (*The Fair American*, Adm., 1796), but that part which was taken while he was there was condemned, and *that* because he was in Holland at the time of the capture." *The Hannibal and Pomona*, Lords, 1800 (*z*).

§ 325. *The Diana.*

The case of *The Diana*, determined by Sir W. Scott, in 1803, is also full of instruction on this subject. During the war which commenced in 1795 between Great Britain and Holland, the colony of Demerara surrendered to the British arms, and by the treaty of Amiens it was restored to the Dutch. That treaty contained an article allowing the inhabitants, of whatever country they might be, a term of three years, to be computed from the notification of the treaty, for the purpose of disposing of their effects acquired before or during the war, in which term they might have the free enjoyment of their property. Previous to the declaration of war against Holland, in 1803, *The Diana* and several other vessels, laden with colonial produce, were captured on a voyage from Demerara to Holland. Immediately after the declaration, and before the expiration of the three years from the notification of the treaty of Amiens, Demerara again surrendered to Great Britain. Claims to the captured property were filed by original British subjects, inhabitants of Demerara, some of whom had settled in the colony while it was in possession of Great Britain; others before that event. The cause came on for hearing after it had again become a British colony.

(*z*) Wheaton's Rep. vol. ii. Appendix, 27, 28, 29.

Sir W. Scott decreed restitution to those British subjects who had settled in the colony while in British possession, but condemned the property of those who had settled there before that time. He held that those of the first class, by settling in Demerara while belonging to Great Britain, afforded a presumption of their intending to return, if the island should be transferred to a foreign power, which presumption, recognized by the treaty, relieved those claimants from the necessity of proving such intention. He thought it reasonable that they should be admitted to their *jus postliminii*, and he held them entitled to the protection of British subjects. But he was clearly of opinion that "mere recency of establishment would not avail, if the intention of making a permanent residence there was fixed upon the party. The case of Mr. Whitehill fully established this point. He had arrived at St. Eustatius only a day or two before Admiral Rodney and the British forces made their appearance; but it was proved that he had gone to establish himself there, and his property was condemned. Here recency, therefore, would not be sufficient."

But the property of those claimants who had settled in Demerara before that colony came into the possession of Great Britain was condemned. "Having settled without any faith in British possession, it cannot be supposed," he said, "that they would have relinquished their residence because that possession had ceased. They had passed from one sovereignty with indifference, and if they may be supposed to have looked again to a connection with this country, they must have viewed it as a circumstance that was in no degree likely to affect their intention of remaining there. On the situation of persons settled there previous to the time of British possession, I feel myself obliged to pronounce, that they must be considered in the same light as persons resident in Amsterdam. It must be understood, however, that if there were among these any who were actually removing, and that fact is properly ascertained, their goods may be capable of restitution. All that I mean to express is, that there must be evidence of an intention to remove on the part of those who settled prior to British possession, the presumption not being in their favour" (*a*).

(*a*) *The Diana*, 5 C. Rob. 60.

§ 326. Case of persons removing from the enemy's country on the breaking out of war. *The Ocean.*

The case of *The Ocean*, determined in 1804, was a claim relating to British subjects settled in foreign States in time of amity, and taking early measures to withdraw themselves on the breaking out of war. It appeared that the claimant had been settled as a partner in a house of trade in Holland, but that he had made arrangements for the dissolution of the partnership, and was prevented from removing personally only by the violent detention of all British subjects who happened to be within the territories of the enemy at the breaking out of the war. In this case Sir W. Scott said: "It would, I think, be going further than the law requires, to conclude this person by his former occupation, and by his present constrained residence in France, so as not to admit him to have taken himself out of the effect of supervening hostilities, by the means which he had used for his removal. On sufficient proof being made of the property, I shall be disposed to hold him entitled to restitution" (*b*).

In a note to this case, Sir C. Robinson states that the situation of British subjects wishing to remove from the enemy's country on the event of a war, but prevented by the sudden occurrence of hostilities from taking measures sufficiently early to obtain restitution, formed not unfrequently a case of considerable hardship in the Prize Court. He advises persons so situated, on their actual removal, to make application to government for a special pass, rather than to trust valuable property to the effect of a mere intention to remove, dubious as that intention may frequently appear under the circumstances that prevent it from being carried into execution. And Sir W. Scott, in the case of *The Dree Gebroeders*, observes, "that pretences of withdrawing funds are at all times to be watched with considerable jealousy; but when the transaction appears to have been conducted *bonâ fide* with that view, and to be directed only to the removal of property, which the accidents of war may have lodged in the belligerent country, cases of this kind are entitled to be treated with some indulgence." But in a subsequent case, where an indulgence was allowed by the Court for the withdrawal of British property under

(*b*) 5 C. Rob. 91.

peculiar circumstances, he intimated that the degree of restitution, in that particular case, was not to be understood as in any degree relaxing the necessity of obtaining a license, wherever property is to be withdrawn from the enemy's country (c).

§ 327. Decisions of the American courts. *The Venus.*

The same principles, as to the effect of domicile, or commercial inhabitancy in the enemy's country, were adopted by the prize tribunals of the United States, during the late war with Great Britain. The rule was applied to the case of native British subjects, who had emigrated to the United States long before the war, and became naturalized citizens under the laws of the Union, as well as to native citizens residing in Great Britain at the time of the declaration. The naturalized citizens in question had, long prior to the declaration of war, returned to their native country, where they were domiciled and engaged in trade at the time the shipments in question were made. The goods were shipped before they had a knowledge of the war. At the time of the capture, one of the claimants was yet in the enemy's country, but had, since he heard of the capture, expressed his anxiety to return to the United States, but had been prevented by various causes set forth in his affidavit. Another had actually returned some time after the capture, and a third was still in the enemy's country.

In pronouncing its judgment in this case, the Supreme Court stated that, there being no dispute as to the facts upon which the domicile of the claimants was asserted, the questions of law to be considered were two: *First*, by what means, and to what extent, a national character may be impressed upon a person, different from that which permanent allegiance gives him? and, *secondly*, what are the legal consequences to which this acquired character may expose him, in the event of a war taking place between the country of his residence and that of his birth, or that in which he had been naturalized?

§ 328. Domicile distinguished from allegiance.

Upon the first of these questions, the opinions of the text writers and the decisions of the British Courts of Prize already cited, were referred to; but it was added that, in deciding whether a person has obtained the right of an

(c) 4 C. Rob. 234. *The Juffrow Catharina*, 5 C. Rob. 141.

acquired domicile, it was not to be expected that much, if any assistance, should be derived from mere elementary writers on the law of nations. They can only lay down the general principles of law; and it becomes the duty of courts of justice to establish rules for the proper application of those principles. The question, whether the person to be affected by the right of domicile has sufficiently made known his intention of fixing himself permanently in the foreign country, must depend upon all the circumstances of the case. If he has made no express declaration on the subject, and his secret intention is to be discovered, his *acts* must be attended to as affording the most satisfactory evidence of his intention. On this ground the courts of England have decided, that a person who removes to a foreign country, settles himself there, and engages in the trade of the country, furnishes by these acts such evidences of an intention permanently to reside there, as to stamp him with the national character of the State where he resides. In questions on this subject, the chief point to be considered is the *animus manendi;* and courts are to devise such reasonable rules of evidence as may establish the fact of intention. If it sufficiently appears that the intention of removing was to make a permanent settlement, or for an indefinite time, the right of domicile is acquired by residence even of a few days. This was one of the rules of the British Prize Courts, and it appeared to be perfectly reasonable. Another was that a neutral or subject, found residing in a foreign country, is presumed to be there *animo manendi;* and if a State at war should bring his national character into question, it lies upon him to explain the circumstances of his residence. As to some other rules of the Prize Courts of England, particularly those which fix the national character of a person, on the ground of constructive residence or the peculiar nature of his trade, the court was not called upon to give an opinion at that time; because, in the present case, it was admitted that the claimants had acquired a right of domicile in Great Britain at the time of the breaking out of the war between that country and the United States.

§ 329. Effect of domicile in

The next question was, what are the consequences to which this acquired domicile may legally expose the person entitled

a foreign State.

to it, in the event of a war taking place between the government under which he resides and that to which he owes permanent allegiance. A neutral, in this situation, if he should engage in open hostilities with the other belligerent, would be considered and treated as an enemy. A citizen of the other belligerent could not be so considered, because he could not, by any act of hostility, render himself, strictly speaking, an enemy, contrary to his permanent allegiance; but although he cannot be considered an enemy, in the strict sense of the word, yet he is deemed such with reference to the seizure of so much of his property concerned in the enemy's trade as is connected with his residence. It is found adhering to the enemy; he is himself adhering to the enemy, although not criminally so, unless he engages in acts of hostility against his native country, or perhaps refuses, when required by his country, to return. The same rule, as to property engaged in the commerce of the enemy, applies to neutrals, and for the same reason. The converse of this rule inevitably applies to the subject of a belligerent State domiciled in a neutral country; he is deemed a neutral by both belligerents, with reference to the trade which he carries on with the adverse belligerent, and with the rest of the world.

§ 330. Renunciation of domicile.

But this national character which a man acquires by residence may be thrown off at pleasure, by a return to his native country, or even by turning his back on the country in which he resided, on his way to another. The reasonableness of this rule can hardly be disputed. Having once acquired a national character, by residence in a foreign country, he ought to be bound by all the consequences of it until he has thrown it off, either by an actual return to his native country, or to that where he was naturalized, or by commencing his removal, *bonâ fide*, and without an intention of returning. If any thing short of actual removal be admitted to work a change in the national character acquired by residence, it seems perfectly reasonable that the evidence of a *bonâ fide* intention should be such as to leave no doubt of its sincerity. Mere declarations of such an intention ought never to be relied upon, when contradicted, or at least rendered doubtful, by a continuance of that residence which impressed the character. They may have been made to deceive; or, if sincerely made,

they may never be executed. Even the party himself ought not to be bound by them, because he may afterwards find reason to change his determination, and ought to be permitted to do so. But when he accompanies these declarations by acts which speak a language not to be mistaken, and can hardly fail to be consummated by actual removal, the strongest evidence is afforded which the nature of such a case can furnish. And is it not proper that the courts of a belligerent nation should deny to any person the right to use a character so equivocal, as to put in his power to claim whichever may best suit his purpose, when it is called in question? If his property be taken trading with the enemy, shall he be allowed to shield it from confiscation, by alleging that he had intended to remove from the enemy's country to his own, then neutral, and therefore that, as a neutral, the trade was to him lawful? If war exists between the country of his residence and his native country, and his property be seized by the former or by the latter, shall he be heard to say, in the former case, that he was a domiciled subject in the country of the captor; and in the latter, that he was a native subject of the country of that captor also, because he had declared an intention to resume his native character, and thus to parry the belligerent rights of both? It was to guard against such inconsistencies, and against the frauds which such pretensions, if tolerated, would sanction, that the rule above mentioned had been adopted. Upon what sound principle could a distinction be framed between the case of a neutral, and the subject of one belligerent domiciled in the country of the other, at the breaking out of the war? The property of each, found engaged in the commerce of their adopted country, belonged to them, before the war, in the character of subjects of that country, so long as they continued to retain their domicile; and when war takes place between that country and any other, by which the two nations and all their subjects become enemies to each other, it follows that this property, which was once the property of a friend, belongs now to him who, in reference to that property, is an enemy.

§ 331. Effect of retaining foreign domicile.

This doctrine of the common-law courts and prize tribunals of England is founded, like that mentioned under the first head, upon international law, and was believed to be strongly

supported by reason and justice. And why, it might be confidently asked, should not the property of enemy's subjects be exposed to the law of reprisals and of war, so long as the owner retains his acquired domicile, or, in the words of Grotius, continues a permanent residence in the country of the enemy? They were before, and continue after the war, bound by such residence to the society of which they were members, subject to the laws of the State, and owing a qualified allegiance thereto. They are obliged to defend it, (with an exception of such subject with relation to his native country,) in return for the protection it affords them, and the privileges which the laws bestow upon them, as subjects. The property of such persons, equally with that of the native subjects in their locality, is to be considered as the goods of the nation, *in regard to other States.* It belongs in some sort to the State, from the right which the State has over the goods of its citizens, which make a part of the sum total of its riches, and augment its power. Vattel, liv. i., ch. 14, § 182. "In reprisals," continues the same author, "we seize on the property of the subject, just as on that of the sovereign; every thing that belongs to the nation is subject to reprisals, wherever it can be seized, with the exception of a deposit intrusted to the public faith." Liv. ii., ch. 18, § 344. Now if a permanent residence constitutes the person a subject of the country where he is settled, so long as he continues to reside there, and subjects his property to the law of reprisals, as a part of the property of the nation, it would seem difficult to maintain that the same consequences would not follow, in the case of an open and public war, whether between the adopted and native countries of persons so domiciled, or between the former and any other nation.

If, then, nothing but an actual removal, or a *bonâ fide* beginning to remove, could change a national character acquired by domicile; and if, at the time of the inception of the voyage, as well as at the time of capture, the property belonged to such domiciled person, in his character of a subject; what was there that did or ought to exempt it from capture by the cruisers of his native country, if, at the time of capture, he continues to reside in the country of the adverse belligerent?

§ 332. Time for election to change domicile not allowed.

It was contended that a native or naturalized subject of one country, who is surprised in the country where he was domiciled, by a declaration of war, ought to have time to make his election to continue there, or to remove to the country to which he owes permanent allegiance; and that, until such election be made, his property ought to be protected from capture by the cruisers of the latter. This doctrine was believed to be as unfounded in reason and justice, as it clearly was in law. In the first place, it was founded upon a presumption that the person will certainly remove, before it can possibly be known whether he may elect to do so or not. It was said, that the presumption ought to be made, because, upon receiving information of the war, it would be his duty to return home. This position was denied. It was his duty to commit no acts of hostility against his native country, and to return to her assistance when required to do so; nor would any just nation, regarding the mild principles of the law of nations, require him to take arms against his native country, or refuse permission to him to withdraw whenever he wished to do so, unless under peculiar circumstances, which, by such removal, at a critical period, might endanger the public safety. The conventional law of nations was in conformity with these principles. It is not uncommon to stipulate in treaties, that the subjects of each party shall be allowed to remove with their property, or to remain unmolested. Such a stipulation does not coerce those subjects to remove or remain. They are left free to choose for themselves; and, when they have made their election, may claim the right of enjoying it, under the treaty. But until the election is made, their former character continues unchanged. Until this election is made, if the claimant's property found upon the high seas, engaged in the commerce of his adopted country, should be permitted by the cruisers of the other belligerent to pass free, under a notion that he may elect to remove upon notice of the war, and should arrive safe; what is to be done, in case the owner of it should elect to remain where he is? For if captured, and brought immediately to adjudication, it must, upon this doctrine, be acquitted, until the election to remain is made and known. In short, the point contended for would apply the doctrine of relation to cases where the party claiming the

benefit of it may gain all and can lose nothing. If he, after the capture, should find it for his interest to remain where he is domiciled, his property, embarked before his election was made, is safe; and if he finds it best to return, it is safe, of course. It is safe, whether he goes or stays. This doctrine producing such contradictory consequences was not only unsupported by any authority, but would violate principles long and well established in the Prize Courts of England, and which ought not, without strong reasons which may render them inapplicable to America, to be disregarded by the Court. The rule there was, that the character of property during war cannot be changed *in transitu*, by any act of the party, subsequent to the capture. The rule indeed went further: as to the correctness of which, in its greatest extension, no judgment needed then to be given; but it might safely be affirmed, that the change could not and ought not to be effected by an election of the owner and shipper, made subsequent to the capture, and more especially after a knowledge of the capture is obtained by the owner. Observe the consequences. The capture is made and known. The owner is allowed to deliberate whether it is his intention to remain a subject of his adopted or of his native country. If the capture be made by the former, then he elects to become a subject of that country; if by the latter, then a subject of that. Could such a privileged situation be tolerated by either belligerent? Could any system of law be correct which places an individual, who adheres to one belligerent, and down to the period of his election to remove, contributes to increase her wealth, in so anomalous a situation as to be clothed with the privileges of a neutral as to both belligerents? This notion about a temporary state of neutrality impressed upon a subject of one of the belligerents, and the consequent exemption of his property from capture by either, until he has had notice of the war and made his election, was altogether a novel theory, and seemed from the course of the argument to owe its origin to a supposed hardship to which the contrary doctrine exposes him. But if the reasoning employed on the subject was correct, no such hardship could exist; for if before the election is made, his property on the ocean is liable to capture by the cruisers of his native and deserted country, it is not only free

from capture by those of his adopted country, but is under its protection. The privilege is supposed to be equal to the disadvantage, and is therefore just. The double privilege claimed seems too unreasonable to be granted (*d*).

§ 333. Merchants residing in the east.

The national character of merchants residing in Europe and America is derived from that of the country in which they reside. In the eastern parts of the world, European persons, trading under the shelter and protection of the factories founded there, take their national character from that association under which they live and carry on their trade: this distinction arises from the nature and habits of the countries. In the western part of the world, alien merchants mix in the society of the natives; access and intermixture are permitted, and they become incorporated to nearly the full extent. But in the east, from almost the oldest times, an immiscible character has been kept up; foreigners are not admitted into the general body and mass of the nation; they continue strangers and sojourners, as all their fathers were. Thus, with respect to establishments in Turkey, the British Courts of Prize, during war with Holland, determined that a merchant, carrying on trade at Smyrna, under the protection of the Dutch consul, was to be considered a Dutchman, and condemned his property as belonging to an enemy. And thus in China, and generally throughout the east, persons admitted into a factory are not known in their own peculiar national character: and not being permitted to assume the character of the country, are considered only in the character of that association or factory.

But these principles are considered not to be applicable to the vast territories occupied by the British in Hindostan; because, as Sir W. Scott observes, "though the sovereignty of the Mogul is occasionally brought forward for the purposes of policy, it hardly exists otherwise than as a phantom: it is not applied in any way for the regulation of their establishments. Great Britain exercises the power of declaring war and peace, which is among the strongest marks of actual sovereignty; and if the high and empyrean sovereignty of the Mogul is sometimes brought down from the clouds, as it

(*d*) *The Venus*, 8 Cranch, 253; *The Mary and Susan*, 1 Wheaton, 54; *U. S.* v. *Guillem*, 9 Howard, 60.

were, for the purposes of policy, it by no means interferes with the actual authority which that country, and the East India Company, a creature of that country, exercise there with full effect. Merchants residing there are hence considered as British subjects" (*e*).

§ 334. House of trade in the enemy's country.

In general, the national character of a person, as neutral or enemy, is determined by that of his domicile; but the property of a person may acquire a hostile character, independently of his national character, derived from personal residence. Thus the property of a house of trade established in the enemy's country is considered liable to capture and condemnation as prize. This rule does not apply to cases arising at the commencement of a war, in reference to persons who, during peace, had habitually carried on trade in the enemy's country, though not resident there, and are therefore entitled to time to withdraw from that commerce. But if a person enters into a house of trade in the enemy's country, or continues that connection during the war, he cannot protect himself by mere residence in a neutral country (*f*).

§ 335. Converse of the rule.

The converse of this rule of the British Prize Courts, which has also been adopted by those of America, is not extended to the case of a merchant residing in a hostile country, and having a share in a house of trade in a neutral country. Residence in a neutral country will not protect his share in a house established in the enemy's country, though residence in the enemy's country will condemn his share in a house established in a neutral country. It is impossible not to see, in this want of reciprocity, strong marks of the partiality towards the interests of captors, which is perhaps inseparable from a prize code framed by judicial legislation in a belligerent country, and adapted to encourage its naval exertions (*g*).

§ 336. Produce of the enemy's territory considered as hostile,

The produce of an enemy's colony, or other territory, is to be considered as hostile property so long as it belongs to the owner of the soil, whatever may be his national character in other respects, or wherever may be his place of residence.

This rule of the British Prize Courts was adopted by the

(*e*) *The Indian Chief*, 3 C. Rob. 12.

(*f*) *The Vigilantia*, 1 C. Rob. 1; *The Susa*, 2 C. Rob. 255; *The Portland*, 3 C. Rob. 41; *The Jonge Klassina*, 5 C. Rob. 297; *The Antonia Johanna*, 1 Wheaton, 159; *The Freundschaft*, 4 Wheaton, 105.

(*g*) Mr. Chief Justice Marshall, in *The Venus*, 8 Cranch, 253.

Supreme Court of the United States during the late war with Great Britain, in the following case. The island of Santa Cruz, belonging to the King of Denmark, was subdued during the late European war by the arms of his Britannic Majesty.

so long as it belongs to the owner of the soil, whatever may be his national character or personal domicile.

Adrian Benjamin Bentzon, an officer of the Danish government, and a proprietor of land in the island, withdrew from the island on its surrender, and had since resided in Denmark. The property of the inhabitants being secured to them by the capitulation, he still retained his estate in the island under the management of an agent, who shipped thirty hogsheads of sugar, the produce of that estate, on board a British ship, and consigned to a commercial house in London, on account and risk of the owner. On her passage the vessel was captured by an American privateer, and brought in for adjudication. The sugars were condemned in the Court below as prize of war, and the sentence of condemnation was affirmed on appeal by the Supreme Court.

§ 337. *The Thirty Hogsheads of sugar.*

In pronouncing its judgment, it was stated by the Court, that some doubt had been suggested whether Santa Cruz, while in the possession of Great Britain, could properly be considered as a British island. But for this doubt there could be no foundation. Although acquisitions, made during war, are not considered as permanent, until confirmed by treaty, yet to every commercial and belligerent purpose they are considered as a part of the domain of the conqueror, so long as he retains the possession and government of them. The island of Santa Cruz, after its capitulation, remained a British island until it was restored to Denmark.

The question was, whether the produce of a plantation in that island, shipped by the proprietor himself, who was a Dane residing in Denmark, must be considered as British, and therefore enemy's property.

In arguing this question the counsel for the claimants had made two points. 1. That the case did not come within the rule applicable to shipments from an enemy's country, even as laid down in the British Courts of Admiralty. 2. That the rule had not been rightly laid down in those Courts, and consequently would not be adopted in those of the United States.

§ 338. Examina-

1. Did the rule laid down in the British Courts of

tion of British cases by the Supreme Court.

Admiralty embrace this case? It appeared to the Court that the case of *The Phœnix* was precisely in point. In that case a vessel was captured in a voyage from Surinam to Holland, and a part of the cargo was claimed by persons residing in Germany, then a neutral country, as the produce of their estates in Surinam. The counsel for the captors considered the law of the case as entirely settled. The counsel for the claimants did not controvert this position. They admitted it, but endeavoured to extricate their case from the general principle by giving it the protection of the treaty of Amiens. In pronouncing his judgment, Sir William Scott laid down the general rule thus: "Certainly nothing can be more decided and fixed, as the principle of this Court, and of the Supreme Court, upon very solemn argument there, than that the possession of the soil does impress upon the owner the character of the country, so far as the produce of that plantation is concerned, in its transportation to any other country whatever the local residence of the owner may be. This has been so repeatedly decided, both in this and the Superior Court, that it is no longer open to discussion. No question can be made upon the point of law at this day" (*h*).

Afterwards, in the case of *The Vrow Anna Catharina*, Sir William Scott laid down the rule, and stated its reason. "It cannot be doubted," said he, "that there are transactions so radically and fundamentally national as to impress the national character, independent of peace or war, and the local residence of the parties. The produce of a person's own plantation in the colony of the enemy, though shipped in time of peace, is liable to be considered as the property of the enemy, by reason that the proprietor has incorporated himself with the permanent interests of the nation as a holder of the soil, and is to be taken as a part of that country in that particular transaction, independent of his own personal residence and occupation" (*i*).

It was contended that this rule, laid down with so much precision, did not embrace Mr. Bentzon's claim, because he had "not incorporated himself with the permanent interests of the nation." He acquired the property while Santa Cruz

(*h*) *The Phœnix*, 5 C. Rob. 21.
(*i*) *The Vrow Anna Catharina*, 5 C. Rob. 167.

was a Danish colony, and he withdrew from the island when it became British.

This distinction did not appear to the Court to be a sound one. The identification of the national character of the owner with that of the soil, in the particular transaction, is not placed on the dispositions with which he acquires the soil, or on his general national character. The acquisition of land in Santa Cruz bound the claimant, so far as respects that land, to the fate of Santa Cruz, whatever its destiny might be. While that island belonged to Denmark, the produce of the soil, while unsold, was, according to this rule, Danish property, whatever might be the general national character of the particular proprietor. When the island became British, the soil and its produce, while that produce remained unsold, were British. The general, commercial, or political character of Mr. Bentzon could not, according to this rule, affect that particular transaction. Although incorporated, so far as respects his general national character, with the permanent interests of Denmark, he was incorporated, so far as respected his plantation in Santa Cruz, with the permanent interests of Santa Cruz, which was at that time British; and though, as a Dane, he was at war with Great Britain, and an enemy, yet as a proprietor of land in Santa Cruz, he was no enemy: he could ship his produce to Great Britain in perfect safety.

2. The case was therefore certainly within the rule as laid down by the British Prize Courts. The next inquiry was, how far that rule will be adopted in this country?

§ 339 Adoption of the English rule in America.

The law of nations is the great source from which we derive those rules, respecting belligerent and neutral rights, which are recognized by all civilized and commercial States throughout Europe and America. This law is in part unwritten, and in part conventional. To ascertain that which is unwritten, we resort to the great principles of reason and justice: but, as these principles will be differently understood by different nations under different circumstances, we consider them as being, in some degree, fixed and rendered stable by a series of judicial decisions. The decisions of the courts of every country, so far as they are founded upon a law common to every country, will be received, not as authority, but with respect. The decisions of the courts of every country show

how the law of nations, in the given case, is understood in that country, and will be considered in adopting the rule which is to prevail in this.

Without taking a comparative view of the justice or fairness of the rules established in the British Prize Courts, and of those established in the courts of other nations, there were circumstances not to be excluded from consideration, which give to those rules a claim to our consideration that we cannot entirely disregard. The United States having, at one time, formed a component part of the British empire, *their* prize law was our prize law. When we separated, it continued to be our prize law, so far as it was adapted to our circumstances, and was not varied by the power which was capable of changing it.

It would not be advanced, in consequence of this former relation between the two countries, that any obvious misconstruction of public law made by the British Courts, is entitled to more respect than the recent rules of other countries. But a case professing to be decided entirely on ancient principles, will not be entirely disregarded, unless it be very unreasonable, or be founded on a construction rejected by other nations.

The rule laid down in *The Phœnix* was said to be a recent rule, because a case solemnly decided before the Lords Commissioners, in 1783, is quoted in the margin as its authority. But that case was not suggested to have been determined contrary to former practice or former opinions. Nor did the Court perceive any reason for supposing it to be contrary to the rule of other nations in a similar case.

The opinion that ownership of the soil does, in some degree, connect the owner with the property, so far as respects that soil, was an opinion which certainly prevailed very extensively. It was not an unreasonable opinion. Personal property may follow the person anywhere; and its character, if found on the ocean, may depend on the domicile of the owner. But land is fixed. Wherever the owner may reside, that land is hostile or friendly according to the condition of the country in which it is placed. It was no extravagant perversion of principle, nor was it a violent offence to the course of human opinion to say, that the proprietor, so far as respects his interest in the land, partakes of its character, and that its produce,

while the owner remains unchanged, is subject to the same disabilities (*k*).

§ 340. National character of ships.

So, also, in general, and unless under special circumstances, the character of ships depends on the national character of the owner, as ascertained by his domicile; but if a vessel is navigating under the flag and pass of a foreign country, she is to be considered as bearing the national character of the country under whose flag she sails: she makes a part of its navigation, and is in every respect liable to be considered as a vessel of the country; for ships have a peculiar character impressed upon them by the special nature of their documents, and are always held to the character with which they are so invested, to the exclusion of any claims of interest which persons resident in neutral countries may actually have in them. But where the cargo is laden on board in time of peace, and documented as foreign property in the same manner with the ship, with the view of avoiding alien duties, the sailing under the foreign flag and pass is not held conclusive as to the cargo. A distinction is made between the ship, which is held bound by the character imposed upon it by the authority of the Government from which all the documents issue, and the goods, whose character has no such dependence upon the authority of the State. In time of war a more strict principle may be necessary; but where the transaction takes place in peace, and without any expectation of war, the cargo ought not to be involved in the condemnation of the vessel, which, under these circumstances, is considered as incorporated into the navigation of that country whose flag and pass she bears (*l*).

§ 340 a. The flag as evidence of ship's nationality.

An exceptional case was decided by the French *Conseil des Prizes* in 1872, in which a vessel was held not to be concluded as to her national character by the flag she carried. *The Palme* was, in 1871, captured by a French cruiser, on a voyage from Accra to Bremen. She carried the German flag, and was therefore *primâ facie* lawful prize. Evidence was produced which showed that *The Palme* was a German-built vessel; that in 1866 she was sold to the *Société du Commerce des Missions Protestantes*, a Swiss corporation; and that she still belonged to the *Société* at the time of capture, though she then carried the German flag. It

(*k*) *Thirty hogsheads of Sugar, Bentzon, Claimant*, 9 Cranch, 191.
(*l*) *The Vigilantia*, 1 C. Rob. 1; *The Vrow Anna Catharina*, 5 C. Rob. 161; *The Success*, 1 Dods. Ad. 131.

also appeared that the Swiss Federal Council did not permit Swiss subjects to fly the Federal flag, and that France had, in 1854, refused to acknowledge any Swiss maritime flag. Thus, the *Société* being compelled to sail its ship under some flag, that of Germany had been retained. In order to do this, the ship was nominally assigned to an agent of the *Société* at Bremen, while the real owners were the *Société* itself. Under these circumstances, the vessel being in reality owned by Swiss, and consequently neutral subjects, the *Conseil des Prizes* held that she was not a German vessel, and therefore restored her to the owners, reversing the decree of the Court below (*m*).

§ 340b. Ownership of British ships.

By the law of England, no ship shall be deemed to be a British ship unless she belongs wholly to owners of the following description :—1. Natural born British subjects. 2. Persons made denizens or naturalized, by letters of denization, or by act of Parliament, or the proper authority in any British possession. 3. Bodies corporate established under, and subject to the laws of, and having their principal place of business in the United Kingdom or some British possession (*n*). If any person uses the British flag and assumes the British national character on board any ship owned in whole or in part by any persons not entitled by law to own British ships, for the purpose of making such ship appear to be a British ship, such ship shall be forfeited to Her Majesty, unless such assumption has been made for the purpose of escaping capture by an enemy, or by a foreign ship of war in exercise of some belligerent right ; and in any proceeding for enforcing any such forfeiture, the burden of proving a title to use the British flag and assume the British national character shall lie upon the person using and assuming the same (*o*). When a ship has become forfeited for such an offence, she may be seized by the Crown whenever she returns within British jurisdiction, and even if transferred to a *bonâ fide* purchaser (*p*).

§ 341. Sailing under the enemy's license.

We have already seen that no commercial intercourse can be lawfully carried on between the subjects of States at war with each other, except by the special permission of their respective governments. As such intercourse can only be legalized in the subjects of one belligerent State by a license from their own government, it is evident that the use of such a license from the enemy must be illegal unless authorized by their own government; for it is the sovereign power of the State alone which is competent to act on the considerations of policy by which such an exception from the ordinary consequences of war must be controlled. And this principle

(*m*) [Dalloz, Jurisprudence Générale, Pt. III. p. 94 (14 espèce).]

(*n*) [17 & 18 Vict. c. 104, s. 18; and see Boyd, The Merchant Shipping Laws, p. 14.]

(*o*) [17 & 18 Vict. c. 104, s. 103 (1); and see Ib., p. 94. *R.* v. *Seberg*, L. R. 1 C. C. R. 264.]

(*p*) [*The Annandale*, 2 P. D. 218.]

is applicable not only to a license protecting a direct commercial intercourse with the enemy, but to a voyage to a country in alliance with the enemy, or even to a neutral port; for the very act of purchasing or procuring the license from the enemy is an intercourse with him prohibited by the laws of war: and even supposing it to be gratuitously issued, it must be for the special purpose of furthering the enemy's interests, by securing supplies necessary to prosecute the war, to which the subjects of the belligerent State have no right to lend their aid, by sailing under these documents of protection (*q*).

(*q*) *The Julia*, 8 Cranch, 181; *The Aurora*, Ib. 203; *The Ariadne*, 2 Wheaton, 143; *The Caledonia*, 4 Wheaton, 100.

CHAPTER II.

RIGHTS OF WAR AS BETWEEN ENEMIES.

§ 342. Rights of war against an enemy.

In general it may be stated, that the rights of war, in respect to the enemy, are to be measured by the object of the war. Until that object is attained, the belligerent has, strictly speaking, a right to use every means necessary to accomplish the end for which he has taken up arms. We have already seen that the practice of the ancient world, and even the opinion of some modern writers on public law, made no distinction as to the means to be employed for this purpose. Even such institutional writers as Bynkershoek and Wolf, who lived in the most learned and not least civilized countries of Europe, at the commencement of the eighteenth century, assert the broad principle, that everything done against an enemy is lawful; that he may be destroyed, though unarmed and defenceless; that fraud, and even poison, may be employed against him; and that an unlimited right is acquired by the victor to his person and property. Such, however, was not the sentiment and practice of enlightened Europe at the period when they wrote, since Grotius had long before inculcated milder and more humane principles, which Vattel subsequently enforced and illustrated, and which are adopted by the unanimous concurrence of all the public jurists of the present age (*a*).

§ 343. Limits to the rights of war against the person of an enemy.

The law of nature has not precisely determined how far an individual is allowed to make use of force, either to defend himself against an attempted injury, or to obtain reparation when refused by the aggressor, or to bring an offender to punishment. We can only collect, from this law, the general

(*a*) Bynkershoek, Quæst. Jur. Pub. lib. i. cap. 1. Wolfius, Jus. Gent. § 878. Grotius, de Jur. Bel. ac. Pac. lib. iii. cap. 4, §§ 5—7. Vattel, Droit des Gens, liv. iii. ch. 8.

rule, that such use of force as is necessary for obtaining these ends is not forbidden. The same principle applies to the conduct of sovereign States existing in a state of natural independence with respect to each other. No use of force is lawful, except so far as it is necessary. A belligerent has, therefore, no right to take away the lives of those subjects of the enemy whom he can subdue by any other means. Those who are actually in arms, and continue to resist, may be lawfully killed; but the inhabitants of the enemy's country who are not in arms, or who, being in arms, submit and surrender themselves, may not be slain, because their destruction is not necessary for obtaining the just ends of war. Those ends may be accomplished by making prisoners of those who are taken in arms, or compelling them to give security that they will not bear arms against the victor for a limited period, or during the continuance of the war. The killing of prisoners can only be justifiable in those extreme cases where resistance on their part, or on the part of others who come to their rescue, renders it impossible to keep them. Both reason and general opinion concur in showing that nothing but the strongest necessity will justify such an act (*b*).

§ 343a. Tendency in modern warfare.

From the immense armies at present maintained by most European States, there seems to be little prospect of their resorting to anything but hostilities for the settlement of their differences. But there is a very wide-spread desire to alleviate the horrors of war as much as possible, and to confine its operation to disabling the enemy without inflicting unnecessary suffering upon him. Civilization has a double effect upon war. It tends to make men more humane, but it also enables them to devise more terrible engines of destruction. The result is that while civilized nations are continually adopting more and more terrible weapons for defending themselves or attacking others, such as torpedoes, &c., they are at the same time endeavouring to establish rules of international law which shall make the use of their weapons as consistent with humanity as the nature of things will permit. This is illustrated by two well-known conventions of recent times.

§ 343b. The Geneva Convention.

In 1864 Switzerland, Belgium, Denmark, Spain, France, Italy, the Netherlands, Portugal, Prussia, and most of the German States, entered into an agreement, known as the Geneva Convention, for ameliorating the condition of the wounded in war. Austria, England, Greece, Persia, Russia, Sweden and Norway, Turkey, and the other German States, subsequently acceded to it. The terms of the Convention are as follows.

I. Ambulances and military hospitals shall be acknowledged to be

(*b*) Rutherforth's Inst., b. ii. ch. 9, § 15. [See *post*, § 411e.]

neuter, and, as such, shall be protected and respected by belligerents so long as any sick or wounded may be therein. Such neutrality shall cease if the ambulances or hospitals should be held by a military force.

II. Persons employed in hospitals and ambulances, comprising the staff for superintendence, medical service, administration, transport of wounded, as well as chaplains, shall participate in the benefit of neutrality while so employed, and so long as there remain any wounded to bring in or succour.

III. The persons designated in the preceding article may, even after occupation by the enemy, continue to fulfil their duties in the hospital or ambulance which they serve, or may withdraw in order to rejoin the corps to which they belong. Under such circumstances, when those persons shall cease from their functions, they shall be delivered by the occupying army to the outposts of the enemy.

IV. As the equipment of military hospitals remains subject to the laws of war, persons attached to such hospitals cannot, in withdrawing, carry away any articles but such as are their private property. Under the same circumstances an ambulance shall, on the contrary, retain its equipment.

V. Inhabitants of the country who may bring help to the wounded shall be respected and shall remain free. The generals of the belligerent powers shall make it their care to inform the inhabitants of the appeal addressed to their humanity, and of the neutrality which will be the consequence of it. Any wounded men entertained and taken care of in a house, shall be considered as a protection thereto. Any inhabitant who shall have entertained wounded men in his house shall be exempted from the quartering of troops, as well as from a part of the contributions of war which may be imposed.

VI. Wounded or sick soldiers shall be entertained and taken care of, to whatever nation they may belong. Commanders-in-chief shall have the power to deliver immediately to the outposts of the enemy, soldiers who have been wounded in an engagement when circumstances permit this to be done, and with the consent of both parties. Those who are recognised, after their wounds are healed, as incapable of serving, shall be sent back to their country. The others may also be sent back on condition of not again bearing arms during the continuance of the war. Evacuations, together with the persons under whose directions they take place, shall be protected by an absolute neutrality.

VII. A distinctive and uniform flag shall be adopted for hospitals, ambulances, and evacuations. It must on every occasion be accompanied by the national flag. An arm-badge (*brassard*) shall also be allowed for individuals neutralised, but the delivery thereof shall be left to military authority. The flag and arm-badge shall bear a red cross on a white ground (*c*).

This Convention has very materially improved the condition of sick and wounded soldiers, and its terms have been generally observed in all subsequent European wars. In the recent Russo-Turkish war, ambulances were established for both armies, the Turkish being dis-

(*c*) [Hertslet, Map of Europe by Treaty, vol. iii. p. 1624.]

tinguished by a red crescent instead of a red cross, but the reported violations of the Convention by the Turks caused Germany to address a remonstrance to the Sublime Porte (*d*).

§ 343 c. The St. Petersburg Declaration.

The other international compact is known as the St. Petersburg Declaration, and prohibits the use of explosive bullets under the weight of 400 grammes during war. It was entered into between Great Britain, Austria, Bavaria, Belgium, Denmark, France, Greece, Italy, the Netherlands, Persia, Portugal, Prussia and the North German Confederation, Russia, Sweden and Norway, Switzerland, Turkey and Wurtemburg. The Declaration states that considering that the progress of civilization should have the effect of alleviating as much as possible the calamities of war;

That the only legitimate object which States should endeavour to accomplish during war is to weaken the military forces of the enemy;

That for this purpose it is sufficient to disable the greatest possible number of men;

That this object would be exceeded by the employment of arms which uselessly aggravate the sufferings of disabled men, or render their death inevitable;

That the employment of such arms would, therefore, be contrary to the laws of humanity;

The Contracting Parties engage mutually to renounce, in case of war among themselves, the employment by their military or naval troops of any projectile of a weight below 400 grammes, which is either explosive or charged with fulminating or inflammable substances;

They will invite all the States which have not taken part in the deliberations of the International Military Commission assembled at St. Petersburg, by sending delegates thereto, to accede to the present engagement.

This engagement is obligatory only upon the Contracting or Acceding Parties thereto, in case of war between two or more of themselves: it is not applicable with regard to non-Contracting Parties, or Parties who shall not have acceded to it;

It will also cease to be obligatory from the moment when, in a war between Contracting or Acceding Parties, a non-Contracting Party, or a non-Acceding Party shall join one of the belligerents;

The Contracting or Acceding Parties reserve to themselves to come hereafter to an understanding, whenever a precise proposition shall be drawn up in view of future improvements which science may effect in the armament of troops, in order to maintain the principles which they have established, and to conciliate the necessities of war with the laws of humanity.

§ 344. Exchange of prisoners of war.

According to the law of war, as still practised by savage nations, prisoners taken in war are put to death. Among the more polished nations of antiquity, this practice gradually gave way to that of making slaves of them. For this, again,

(*d*) [Parl. Papers. Turkey, 1878 (No. 1), pp. 168, 209.]

was substituted that of ransoming, which continued through the feudal wars of the middle age. The present usage of exchanging prisoners was not firmly established in Europe until some time in the course of the seventeenth century. Even now, this usage is not obligatory among nations who choose to insist upon a ransom for the prisoners taken by them, or to leave their own countrymen in the enemy's hands until the termination of the war. Cartels for the mutual exchange of prisoners of war are regulated by special convention between the belligerent States, according to their respective interests and views of policy. Sometimes prisoners of war are permitted, by capitulation, to return to their own country, upon condition not to serve again during the war, or until duly exchanged; and officers are frequently released upon their parole, subject to the same condition. Good faith and humanity ought to preside over the execution of these compacts, which are designed to mitigate the evils of war, without defeating its legitimate purposes. By the modern usage of nations, commissaries are permitted to reside in the respective belligerent countries, to negotiate and carry into effect the arrangements necessary for this object. Breach of good faith in these transactions can be punished only by withholding from the party guilty of such violation the advantages stipulated by the cartel; or, in cases which may be supposed to warrant such a resort, by reprisals or vindictive retaliation (*e*).

§ 344 a. Persons not entitled to be treated as prisoners of war.

Sir Robert Phillimore enumerates the following classes of persons as having no claim to the treatment of prisoners of war :—

1. Bands of marauders, acting without the authority of the sovereign, or the order of the military commander,—a class which, of course, does not include volunteer corps permitted to attach themselves to the army, and under the command of the general of the army.

2. Deserters, captured among the enemy's troops.

3. Spies, even if they belong to the regular army (*f*).

The laws of war justify the execution of spies when found by a commander within the lines of his army, or giving information of his plans

(*e*) Grotius, de Jur. Bel. ac Pac. lib. iii. cap. 7, §§ 8, 9; cap. 11, §§ 9—13. Vattel, Droit des Gens, liv. iii. ch. 8, § 153. C. Robinson's Adm. Rep. vol. iii. Note, Appendix A. Correspondence between M. Otto, French Commissary of Prisoners in England, and the British Transport Board, 1801. Annual Register, vol. xliv. p. 265. (State Papers.) Wheaton's Hist. Law of Nations, pp. 162—164. [See *post*, § 411 h.]

(*f*) [Phillimore, vol. iii. § xcvi. p. 164. See also Field, International Code, § 802.]

and movements to the enemy. Deserters found in the enemy's ranks may be treated in whatever manner the municipal laws of their country ordain. The penalty is not unfrequently capital punishment (*g*). The employment of bands of marauders or savages, even though acknowledged by the sovereign, cannot be too strongly denounced, and justifies the other side in treating such auxiliaries with great severity when they are captured. The melancholy effects of using such allies have repeatedly been seen during the recent Russo-Turkish war. The atrocities committed by Cossacks and Bulgarians in the service of Russia, and by Circassians and Bashi-Bazouks in that of Turkey, have fixed an indelible stain on the whole war.

§ 344 b. Persons in balloons.

A question arose during the Franco-German war as to what treatment persons should receive who ascended in balloons in order to reconnoitre the enemy's forces. Those who were captured by the Germans were imprisoned in fortresses, and brought to trial before a council of war. M. Calvo and Sir R. Phillimore consider that they ought to be treated as prisoners of war (*h*). They certainly do not deserve to be condemned as spies, but the disadvantage under which a general labours, whose movements can be surveyed from a balloon, justifies his threatening to treat aeronauts severely if they fall into his hands, in order to deter any one from undertaking the task.

§ 345. Persons exempt from acts of hostility.

All the members of the enemy State may lawfully be treated as enemies in a public war; but it does not therefore follow, that all these enemies may be lawfully treated alike; though we may lawfully destroy some of them, it does not therefore follow, that we may lawfully destroy all. For the general rule, derived from the natural law, is still the same, that no use of force against an enemy is lawful, unless it is necessary to accomplish the purposes of war. The custom of civilized nations, founded upon this principle, has therefore exempted the persons of the sovereign and his family, the members of the civil government, women and children, cultivators of the earth, artisans, labourers, merchants, men of science and letters, and, generally, all other public or private individuals engaged in the ordinary civil pursuits of life, from the direct effect of military operations, unless actually taken in arms, or guilty of some misconduct in violation of the usages of war, by which they forfeit their immunity (*i*).

§ 346. Enemy's

The application of the same principle has also limited and

(*g*) [Calvo, ii. § 858, p. 142.]
(*h*) [Calvo, ii. § 857, p. 142. Phillimore, iii. § 97, p. 164.]
(*i*) Rutherforth's Inst., b ii. ch. 9, § 15. Vattel, Droit des Gens, liv. iii. ch. 8, §§ 145—147, 159. Klüber, Droit des Gens Moderne de l'Europe, Pt. II. tit. 2, sect. 2, ch. 1, §§ 245—247.

property, how far subject to capture and confiscation.

restrained the operations of war against the territory and other property of the enemy. From the moment one State is at war with another, it has, on general principles, a right to seize on all the enemy's property, of whatsoever kind and wheresoever found, and to appropriate the property thus taken to its own use, or to that of the captors. By the ancient law of nations, even what were called *res sacræ* were not exempt from capture and confiscation. Cicero has conveyed this idea in his expressive metaphorical language, in the Fourth Oration against Verres, where he says that "Victory made all the *sacred* things of the Syracusans *profane*." But by the modern usage of nations, which has now acquired the force of law, temples of religion, public edifices devoted to civil purposes only, monuments of art, and repositories of science, are exempted from the general operations of war. Private property on land is also exempt from confiscation, with the exception of such as may become booty in special cases, when taken from enemies in the field or in besieged towns, and of military contributions levied upon the inhabitants of the hostile territory. This exemption extends even to the case of an absolute and unqualified conquest of the enemy's country. In ancient times, both the moveable and immoveable property of the vanquished passed to the conqueror. Such was the Roman law of war, often asserted with unrelenting severity; and such was the fate of the Roman provinces subdued by the northern barbarians, on the decline and fall of the western empire. A large portion, from one-third to two-thirds, of the lands belonging to the vanquished provincials, was confiscated and partitioned among their conquerors. The last example in Europe of such a conquest was that of England, by William of Normandy. Since that period, among the civilized nations of Christendom, conquest, even when confirmed by a treaty of peace, has been followed by no general or partial transmutation of landed property. The property belonging to the government of the vanquished nation passes to the victorious State, which also takes the place of the former sovereign, in respect to the eminent domain. In other respects, private rights are unaffected by conquest (*l*).

(*l*) Vattel, Droit des Gens, liv. iii. ch. 9 § 13. Klüber, Droit des Gens

§ 346a. Enemy's private property on land.

The modern practice of nations has firmly established the general rule of exempting private property on land from confiscation (*m*). But this rule is subject to certain limitations. General Halleck, who has treated this subject very fully, gives three exceptions—(1) confiscations or seizures by way of penalty for military offences; (2) forced contributions for the support of the invading armies, or as an indemnity for the expenses of maintaining order and affording protection to the conquered inhabitants; and (3) property taken on the field of battle, or in storming a fortress or town (*n*). Private property is exempt from the operations of war only so long as its owners obey the laws of war. An invader protects non-combatants and their property as long as they take no part in the struggle. As soon as they relinquish this character, the reasons which restrained the invader cease, and he may then punish such individuals by seizing their property, or if this cannot be discovered and secured, their offence may be visited upon the community to which they belong (*o*). Forced contributions for the support of the invading army should only be resorted to in cases of necessity (*p*). If a general is not provided with the necessaries for an army by his own government, he must of course obtain them from the invaded provinces. These should, however, be paid for either out of the invader's own funds, or by money collected from the whole district, so that the actual individuals to whom the necessaries belong should not suffer more than the rest of the community. Napoleon attributed his losses in the Peninsula in a great measure to the bitter feeling created among the Spaniards by his forced requisitions and pillage for the supply of his army (*q*).

Private property found on the field of battle belongs to the conqueror, and so does that which is taken at the sack of a town, but a general cannot be too careful in repressing pillage in the latter case. It, however, unfortunately often happens that military discipline is relaxed after an assault, and the general is unable to restrain his soldiers from plundering private houses. The plunder of the Emperor of China's summer palace by the troops of France and England in the last war against China, shows that the most civilized nations do not, even now, invariably restrain their troops from pillaging private property. The palace, it is true, belonged to the Emperor, but the private property of a sovereign ought to be just as exempt from the effects of war as that of any of his subjects (*r*).

§ 346b. Seizure of Confederate cotton.

There is yet another case when private property may be seized. If it be such that it ministers directly to the strength of the enemy, and its possession alone enables him to supply himself with the munitions of war, and to continue the struggle, it may then be confiscated. Thus

Moderne de l'Europe, Pt. II. tit. 2, sect. 2, ch. 1, §§ 250—253. Martens, Précis, &c., liv. viii. ch. iv. §§ 279—282.

(*m*) [Field, Int. Code, ch. lxiv. p. 526. Bluntschli, Droit Int. Codifié, § 651.]

(*n*) [Halleck, ch. xix. § 13, p. 457.]

(*o*) [Ibid., p. 458.]

(*p*) [See *Mitchell* v. *Harmony*, 13 Howard, 134, as to seizing goods in the enemy's country belonging to a subject of the seizor's own state.]

(*q*) [Napier, Peninsular War, b. 24, ch. 6.]

(*r*) [Calvo, ii. § 897. Halleck, ch. xix. § 12.

during the American civil war cotton was the mainstay of the Confederates; without it they could not have continued the rebellion. The Supreme Court therefore decided that it could lawfully be captured by the Federal troops, notwithstanding that it was strictly private property (*s*). "The whole doctrine of confiscation," said the Supreme Court in a recent case, "is built upon the foundation that it is an instrument of coercion, which, by depriving an enemy of property within reach of his power, whether within his territory or without, impairs his ability to resist the confiscating government, while at the same time it furnishes to that government means for carrying on the war. Hence any property which the enemy can use, either by actual appropriation or by the exercise of control over its owner, or which the adherents of the enemy have the power of devoting to the enemy's use, is a proper subject of confiscation" (*t*).

In France the power of directing the seizure of an enemy's property on land is held to belong exclusively to the legislature. No other authority can legally authorize such a course (*u*).

§ 346c. Effects of military occupation.

When a district or province has fallen into the hands of an enemy, the political *status* of the inhabitants is changed. The sovereignty of their former government is suspended, and their allegiance to it is, for the time being, dissolved. During the occupation they become subject to such laws as the conqueror may choose to impose. No other laws can in the nature of things be obligatory upon them, for where there is no protection or sovereignty, there can be no claim to obedience (*x*). The inhabitants, however, cannot be required to take up arms against their own country. At the same time their private rights, and their relations to each other, unless specially altered by the conqueror, remain the same (*y*). Firm military occupation transfers all the rights of the displaced sovereignty to the victor, and he may therefore use the public property of the former as he thinks fit, and may appropriate to himself the rates and taxes due to it. But this is only the case so long as the occupation lasts; as soon as the district is lost, the rights of military occupation over it are also lost (*z*). If the district is retaken by its original sovereign, it reverts to the same state it was in before it was lost (*a*). The effects of military occupation are different with regard to moveable and to immoveable property. It gives the conqueror the right to acquire a complete title to moveables, and to transfer them to any one he pleases, but it only gives him a qualified right over immoveables. He may use real property as he pleases during his occupation, but if he sells it, the purchaser takes it at the risk of being evicted by the original owner. It is only on the conclusion of peace that the invader's

(*s*) [*Mrs. Alexander's cotton*, 2 Wallace, 420; *U. S.* v. *Padelford*, 9 Wallace, 540; *Haycraft* v. *U. S.* 22 Wallace, 93.]

(*t*) [*Miller* v. *U. S.*, 11 Wallace, 306.]

(*u*) [Dalloz, Jurisp. Générale, 1872, Pt. III. pp. 94, 95.]

(*x*) [*U. S.* v. *Hayward*, 2 Gallison, 502.]

(*y*) [*The Fama*, 5 C. Rob. 106; *U. S.* v. *Percheman*, 7 Peters, 86; *Leitensdorfer* v. *Webb*, 20 Howard, 176; *U. S.* v. *Moreno*, 1 Wallace, 531.]

(*z*) [Halleck, ch. xxxii. § 4; *U. S.* v. *Rice*, 4 Wheaton, 246; *Fleming* v. *Page*, 9 Howard, 614.]

(*a*) [*Gumbe's case*, 2 Knapp, P. C. 369.]

rights over such property become fixed (*b*). Military occupation must be distinguished from complete conquest. The former is only a temporary state, lasting during the war, the latter is permanent, and its conditions are provided for in the treaty of peace. The Supreme Court of the United States has decided that when a portion of the American Union is occupied by a public enemy, that portion is to be deemed a foreign country so far as respects revenue laws, and that goods imported into it are not imported into the Union (*c*). On the other hand, when the forces of the Union occupy a foreign territory, such territory comes under the sovereignty of the Union, but does not become part of the United States, although foreign nations are bound to regard it as such. It is to be governed by military law, as regulated by public law. This results from the President having power to make war, and subject the enemy's country, but only in a military sense. He has no power to enlarge the boundaries of the Union. This can only be done by Congress, the treaty-making power (*d*). According to British law, an occupied territory becomes *ipso facto* a part of the British dominions (*e*).

§ 346 d. Martial and military law.

Martial law has been defined to be, the will of the commanding officer of an armed force, or of a geographical military department, expressed in time of war within the limits of his military jurisdiction, as necessity demands and prudence dictates, restrained or enlarged by the orders of his military chief or supreme executive ruler (*f*). Military law is the rules and regulations made by the legislative power of the State for the government of its naval or military forces. The military law of England is chiefly contained in the Mutiny Acts and the Articles of War (*g*). Military law exists equally in time of peace as in time of war; it is quite distinct from martial law (*h*). The laws of war (when that expression is not used as a generic term) are the laws which govern the conduct of belligerents towards each other and other nations, *flagarante bello* (*i*). Military government is the government imposed by a successful belligerent, either over a foreign province or over a district retaken from insurgents, treated as belligerents. This supersedes, as far as may be deemed expedient, the local law, and continues until the war or rebellion is terminated, and a regular civil authority is instituted (*k*).

§ 346 e. Martial law is only

Martial law is founded on paramount necessity. It is the will of the commander of the forces. In the proper sense it is not law at all (*l*). It is merely a cessation from necessity of all municipal law, and what

(*b*) [Halleck, ch. xix. § 4. See also *post*, §§ 398 and 411 c.]

(*c*) [*U. S.* v. *Rice*, 4 Curtis, 391.]

(*d*) [*Fleming* v. *Page*, 9 Howard, 615. See on this subject Whiting, War Powers of the President under the United States Constitution (43rd ed.).]

(*e*) [Halleck, ch. xxxii. § 7. See, as to cession of territory, arguments in *Damodhar Gordhan* v. *Deoram Kanzi*, 1 App. Cas. 353.]

(*f*) [*Ex parte Milligan*, 4 Wallace, 14 (argument). Hansard, Parl. Deb. (3rd series), vol. xcv. p. 80. Opinions of Atty's-Gen. (U. S.) vol. viii. p. 367.]

(*g*) [*Wolfe Tone's case*, 27 State Trials, 615; *Wolton* v. *Gavin*, 16 Q. B. 61.]

(*h*) [Kent, Commentaries, vol. i. (12th ed.) p. 341, note (*a*).]

(*i*) [Argument in *Ex parte Milligan*, 4 Wallace, 14.]

(*k*) [Ibid., pp. 141, 142.]

(*l*) [Speech of Duke of Wellington, 1st April, 1851. Field, International Code (2nd ed.), p. 478.]

justified by necessity.

necessity requires it justifies (*m*). Under it, a man in actual armed resistance may be put to death on the spot by anyone acting under the orders of competent authority; or, if arrested, may be tried in any manner which such authority shall direct. But if there be an abuse of the power so given, and acts are done under it, not *bonâ fide* to suppress rebellion and in self-defence, but to gratify malice or in the caprice of tyranny, then for such acts the party doing them is responsible (*n*).

Opinion of Sir James Mackintosh.

Sir James Mackintosh has said on this subject, "The only principle on which the law of England tolerates what is called 'martial law' is necessity. Its introduction can be justified only by necessity; its continuance requires precisely the same justification of necessity; and if it survives the necessity, in which alone it rests, for a single minute, it becomes instantly a mere exercise of lawless violence. When foreign invasion or civil war renders it impossible for courts of law to sit, or to enforce the execution of their judgments, it becomes necessary to find some rude substitute for them, and to employ for that purpose the military, which is the only remaining force in the community.

"While the laws are silenced by the noise of arms, the rulers of the armed force must punish as equitably as they can those crimes which threaten their own safety and that of society, but no longer; every moment beyond is usurpation. As soon as the laws can act, every other mode of punishing supposed crimes is itself an enormous crime. If argument be not enough on this subject—if, indeed, the mere statement be not the evidence of its own truth—I appeal to the highest and most venerable authority known to our law."

He then quotes Sir Matthew Hale, and cites the case of the Duke of Lancaster, who was executed when taken prisoner at the battle of Boroughbridge, 1322 (*o*), and proceeds:—

"No other doctrine has ever been maintained in this country since the solemn parliamentary condemnation of the usurpation of Charles I., which he was himself compelled to sanction in the Petition of Right" (*p*).

If in foreign invasion or civil war, the courts of law are actually closed, and it is then impossible to administer criminal justice according to law, then, on the theatre of actual military operations, where war really prevails, there is a necessity to furnish a substitute for the civil authority, thus overthrown, to preserve the safety of the army and society; as no power is left but the military, it is allowed to govern by martial rule until the laws can have their free course. As necessity creates the rule, so it limits its duration; for, if this government is continued after the courts are reinstated, it is a gross usurpation of power. Martial rule ought to never exist where the courts are open, and in the proper and unobstructed exercise of their jurisdiction. It should also be confined to the locality of actual war or insurrection (*q*).

(*m*) [Forsyth, Cases and Opinions on Constitutional Law, p. 201.]

(*n*) [Ibid., p. 214. Finlason, on Martial Law (London, 1867).]

(*o*) [Hale, Pleas of the Crown, pp. 499, 500. Hume, Hist. of England, vol. i. p. 159.]

(*p*) [Mackintosh's Miscellaneous Works, p. 734, London, 1851.]

(*q*) [*Ex parte Milligan*, 4 Wallace, 127. See also *Smith* v *Shaw*, 12 John-

§ 346 f. Martial law during the American civil war. *Milligan's case.*

In October, 1864, during the civil war, Lambdin P. Milligan, a citizen of the United States, and an inhabitant of Indiana, was arrested, while at home, by order of the Federal general commanding the military district of Indiana. Though not a military person, he was sent to Indianapolis, and brought before a military commission sitting there, tried on certain charges of conspiring against the government, found guilty, and sentenced to be hanged. The question, which was brought before the Supreme Court, was whether the military commission had jurisdiction legally to try and sentence him. In Indiana the Federal authority was not opposed by force, and its courts were always open to hear criminal accusations and redress grievances. But a powerful secret association, which plotted insurrection and armed co-operation with the rebels, existed in the State. On the question as to whether, under such circumstances, Congress had power to appoint a military commission to try and condemn citizens, not being military persons—that is, whether martial law could be proclaimed—the judges of the Supreme Court differed. But they were unanimous in holding that, as this power had not been distinctly exercised, Milligan being a citizen not connected with the military service, could not be tried, convicted, and sentenced otherwise than by the ordinary courts of law (*r*).

§ 346 g. Martial law in France. *Geoffroy's case.*

A somewhat similar case was decided in France in 1832. A royal order, dated the 6th of June, 1832, had put Paris in a state of siege, and under it military commissions were appointed, which tried and convicted several persons. One, Geoffroy, was declared guilty of an attack with intent to subvert the government, and was condemned to death. He appealed to the Court of Cassation. This Court held that Geoffroy not being a military person, or subject to military authority, the military commission had no jurisdiction over him, and its sentence was accordingly annulled (*s*). Martial law has on several occasions been proclaimed in Ireland and in some of the British colonies for the suppression of disturbances. But it has not been put in force in England against civilians (*t*).

In England.

§ 347. Ravaging the enemy's territory, when lawful.

The exceptions to these general mitigations of the extreme rights of war, considered as a contest of force, all grow out of the same original principle of natural law, which authorizes us to use against an enemy such a degree of violence, and such only, as may be necessary to secure the object of hostilities. The same general rule, which determines how far it is

son, 257; *McConnell* v. *Hampden*, Ibid., 234; *Luther* v. *Borden*, 7 Howard, 42.]

(*r*) [*Ex parte Milligan*, 4 Wallace, 5—142.]

(*s*) [Forsyth, Cases and Opinions, p. 483. See on this subject Mr. Field's argument in McCardale's case, Ibid., p. 491. And his argument in Milligan's case, published separately, with an appendix (New York, 1866); also in 4 Wallace, 4. *Phillipps* v. *Eyre*, L. R. 6 Q. B. 1. Law Magazine, Nov. 1861, p. 170.]

(*t*) [Forsyth, Cases and Opinions, p. 212. Sir A. Cockburn's charge to the grand jury in *R.* v. *Eyre*. The Law Magazine, Nov. 1861, p. 171.]

lawful to destroy the persons of enemies, will serve as a guide in judging how far it is lawful to ravage or lay waste their country. If this be necessary, in order to accomplish the just ends of war, it may be lawfully done, but not otherwise. Thus, if the progress of an enemy cannot be stopped, nor our own frontier secured, or if the approaches to a town intended to be attacked cannot be made without laying waste the intermediate territory, the extreme case may justify a resort to measures not warranted by the ordinary purposes of war. If modern usage has sanctioned any other exceptions, they will be found in the right of reprisals, or vindictive retaliation. The whole international code is founded upon reciprocity. The rules it prescribes are observed by one nation, in confidence that they will be so by others. Where, then, the established usages of war are violated by an enemy, and there are no other means of restraining his excesses, retaliation may justly be resorted to by the suffering nation, in order to compel the enemy to return to the observance of the law which he has violated (*u*).

§ 348. Discussions between the American and British governments upon this subject.

The last war between the United States and Great Britain was marked by a series of destructive measures on the part of the latter, directed against both persons and property hitherto deemed exempt from hostilities by the general usage of civilized nations. These measures were attempted to be justified, as acts of retaliation for similar excesses on the part of the American forces on the frontiers of Canada, in a letter addressed to Mr. Secretary Monroe, by Admiral Cochrane, commanding the British naval forces on the North American station, dated on board his flagship in the Patuxent river, on the 18th of August, 1814. In this communication it was stated that the British admiral, having been called upon by the governor-general of the Canadas to aid him in carrying into effect measures of retaliation against the inhabitants of the United States, for the wanton destruction committed by their army in Upper Canada, it had become the duty of the admiral to issue to the naval forces under his command an

(*u*) Vattel, liv. iii. ch. 8, § 142; ch. 9, §§ 166—173. Martens, Précis du Droit des Gens Moderne de l'Europe, liv. viii. ch. 4, §§ 272—280. Klüber, Pt. II. tit. 2, sect. 2, ch. 1, §§ 262—265. [Twiss, War, p. 124.]

order to destroy and lay waste such towns and districts on the coast as might be found assailable.

§ 349. Answer of the United States.

In the answer of the American government to this communication, dated at Washington on the 6th of September, 1814, it was stated that it had seen, with the greatest surprise, that this system of devastation which had been practised by the British forces, so manifestly contrary to the usages of civilized warfare, was placed on the ground of retaliation. No sooner were the United States compelled to resort to war against Great Britain, than they resolved to wage it in a manner most consonant to the principles of humanity, and to those friendly relations which it was desirable to preserve between the two nations, after the restoration of peace. They perceived, however, with the deepest regret, that a spirit alike just and humane, was neither cherished nor acted on by the British government. Without dwelling on the deplorable cruelties committed by the Indian savages, in the British ranks and in British pay, at the river Raisin, which had never been disavowed or atoned for, the American government referred, as more particularly connected with the subject of the above communication, to the wanton desolation that was committed, in 1813, at Havre-de-Grace and Georgetown, in the Chesapeake Bay. These villages were burnt and ravaged by the British naval forces, to the ruin of their unarmed inhabitants, who saw with astonishment that they derived no protection to their property from the laws of war. During the same season, scenes of invasion and pillage, carried on under the same authority, were witnessed all along the shores of the Chesapeake, to an extent inflicting the most serious private distress, and under circumstances that justified the suspicion, that revenge and cupidity, rather than the manly motives that should dictate the hostility of a high-minded foe, led to their perpetration. The late destruction of the houses of the government at Washington, was another act which came necessarily into view. In the wars of modern Europe, no example of the kind, even among nations the most hostile to each other, could be traced. In the course of ten years past, the capitals of the principal powers of the European continent had been conquered, and occupied alternately by the victorious armies of each other, and no instance of such wanton and

unjustifiable destruction had been seen. They must go back to distant and barbarous ages, to find a parallel for the acts of which the American government complained.

Although these acts of desolation invited, if they did not impose on that government the necessity of retaliation, yet in no instance had it been authorized.

The burning of the village of Newark, in Upper Canada, posterior to the early outrages above enumerated, was not executed on the principle of retaliation. The village of Newark adjoined Fort George, and its destruction was justified, by the officers who ordered it, on the ground that it became necessary in the military operations there. The act, however, was disavowed by the American government. The burning which took place at Long Point was unauthorized by the government, and the conduct of the officer had been subjected to the investigation of a military tribunal. For the burning at St. David's, committed by stragglers, the officer who commanded in that quarter was dismissed, without a trial, for not preventing it.

The American government stated, that it as little comported with any orders which had been issued to its military and naval commanders, as it did with the known humanity of the American nation, to pursue the system which had been adopted by the British. That government owed to itself, and to the principles it had ever held sacred, to disavow, as justly chargeable to it, any such wanton, cruel, and unjustifiable warfare. Whatever unauthorized irregularities might have been committed by any of its troops, it would have been ready, acting on the principles of sacred and eternal obligation, to disavow, and, as far as might be practicable, to repair them. But in the plan of desolating warfare which Admiral Cochrane's letter so explicitly made known, and which was attempted to be excused on a plea so utterly groundless, the American government perceived a spirit of deep-rooted hostility, which, without the evidence of such fact, it could not have believed to exist, or that it would have been carried to such an extremity for the reparation of injuries, of whatsoever nature they might be, not sanctioned by the law of nations, which the naval or military forces of either power might have committed against the other. That the government would

always be ready to enter into reciprocal arrangements; but should the British government adhere to a system of desolation, so contrary to the views and practices of the United States, so revolting to humanity, and so repugnant to the sentiments and usages of the civilized world, whilst it would be seen with the deepest regret, it must and would be met with a determination and constancy becoming a free people, contending in a just cause for their essential rights and their dearest interests.

§ 350. British admiral's reply.

In the reply of Admiral Cochrane to the above communication, dated on the 19th September, 1814, it was stated that he had no authority from his government to enter into any kind of discussion relative to the point contained in that communication. He had only to regret that there did not appear to be any hope that he should be authorized to recall his general order, which had been further sanctioned by a subsequent request, from the governor-general of the Canadas. Until the admiral received instructions from his government, the measures he had adopted must be persisted in, unless remuneration should be made to the Canadians for the injuries they had sustained from the outrages committed by the troops of the United States (*x*).

The disavowal of the burning of Newark by the American government had been communicated to the governor-general of the Canadas, who answered, on the 10th February, 1814, that it had been with great satisfactiom that he had received the assurance that it was unauthorized by the American government and abhorrent to every American feeling; that if any outrages had ensued, in the wanton and unjustifiable destruction of Newark, passing the bounds of just retaliation, they were to be attributed to the influence of irritated passions on the part of the unfortunate sufferers by that event, which it had not been possible altogether to restrain; and that it was as little congenial to the disposition of the British government as it was to that of the United States, deliberately to adopt any plan of hostilities which had for its object the devastation of private property.

§ 351. Burning of

Under these circumstances, the destruction of the Capitol,

(*x*) Correspondence between Mr. Secretary Monroe and Admiral Cochrane, American State Papers, fol. edit. vol. iii. pp. 693, 694.

Washington.

of the President's house, and other public buildings at Washington, in August, 1814, could not but be considered by the whole world as a most unjustifiable departure from the laws of civilized warfare. In the debate which took place in the House of Commons on the 11th of April, 1815, on the Address to the Prince Regent on the treaty of peace with the United States, Sir James Mackintosh accused the ministers of culpable delay in opening the negotiations at Ghent; which, he said, could not be explained, except on the miserable policy of protracting the war for the sake of striking a blow against America. The disgrace of the naval war, of balanced success between the British navy and the new-born marine of America, was to be redeemed by protracted warfare, and by pouring their victorious armies upon the American continent. That opportunity, fatally for them, arose. If the Congress had opened in June, it was impossible that they should have sent out orders for the attack on Washington. They would have been saved from that success, which he considered as a thousand times more disgraceful and disastrous than the worst defeat. It was a success which had made their naval power hateful and alarming to all Europe. It was a success which gave the hearts of the American people to every enemy who might rise against England. It was an enterprise which most exasperated a people, and least weakened a government, of any recorded in the annals of war. For every justifiable purpose of present warfare, it was almost impotent. To every wise object of prospective policy, it was hostile. It was an attack, not against the strength or the resources of a State, but against the national honour and public affections of a people. After twenty-five years of the fiercest warfare, in which every great capital of the European continent had been spared, he had almost said respected, by enemies, it was reserved for England to violate all that decent courtesy towards the seats of national dignity, which, in the midst of enmity, manifest the respect of nations for each other, by an expedition deliberately and principally directed against palaces of government, halls of legislation, tribunals of justice, repositories of the muniments of property, and of the records of history; objects, among civilized nations exempted from the ravages of war, and secured, as far as

possible, even from its accidental operation, because they contribute nothing to the means of hostility, but are consecrated to purposes of peace, and minister to the common and perpetual interest of all human society. It seemed to him an aggravation of this atrocious measure, that ministers had endeavoured to justify the destruction of a distinguished capital, as a retaliation for some violences of inferior American officers, unauthorized and disavowed by their government, against he knew not what village in Upper Canada. To make such retaliation just, there must always be clear proof of the outrage; in general also, sufficient evidence that the adverse government had refused to make due reparation for it; and, lastly, some proportion of the punishment to the offence. Here there was very imperfect evidence of the outrage—no proof of refusal to repair—and demonstration of the excessive and monstrous iniquity of what was falsely called retaliation. The value of a capital is not to be estimated by its houses, and warehouses, and shops. It consisted chiefly in what could be neither numbered nor weighed. It was not even by the elegance or grandeur of its monuments that it was most endeared to a generous people. They looked upon it with affection and pride as the seat of legislation, as the sanctuary of public justice, often as linked with the memory of past times, sometimes still more as connected with their fondest and proudest hopes of greatness to come. To put all these respectable feelings of a great people, sanctified by the illustrious name of Washington, on a level with half a dozen wooden sheds in the temporary seat of a provincial government, was an act of intolerable insolence, and implied as much contempt for the feelings of America as for the common sense of mankind (*y*).

§ 351 a. Ravaging territory.

The devastation of his own territory has sometimes been resorted to by a belligerent for the purpose of impeding the advance of the enemy, and this is perfectly justifiable. Thus, Peter the Great contributed to his victory over Charles XII. at Pultawa by laying waste eighty square leagues of Russian territory that lay in the path of the Swedish army. In 1812, the Russians caused the destruction of Napoleon's army by burning down Moscow (*z*). The ravaging of Georgia and Carolina by General Sherman during the American Civil War, was perhaps a

(*y*) Hansard's Parliamentary Debates, vol. xxx. pp. 526, 527.
(*z*) [Calvo, ii. § 893.]

necessary military operation on the part of the Federal troops, and it certainly tended to bring the war to a more rapid conclusion (*a*).

§ 352. Restitution of the works of art in the Museum of the Louvre at Paris in 1815, to the countries from which they had been taken during the wars of the French revolution.

The invasion of France by the allied powers of Europe, in 1815, was followed by the forcible restitution of the pictures, statues, and other monuments of art, collected from different conquered countries during the wars of the French revolution, and deposited in the museum of the Louvre. The grounds upon which this measure was adopted are fully explained in a note delivered by the British minister, Lord Castlereagh, to the ministers of the other allied powers at Paris, on the 11th September, 1815. In this note it was stated by the British plenipotentiary, that representations had been laid before the Congress, assembled in that capital, from the Pope, the Grand Duke of Tuscany, the King of the Netherlands, claiming, through the intervention of the allied powers, the restoration of the statues, pictures, and other works of art, of which their respective States had been successively stripped by the late revolutionary government of France, contrary to every principle of justice, and to the usages of modern warfare;—and the same having been referred for the consideration of his Court, he had received the Prince Regent's commands to submit, for the consideration of his allies, the following remarks upon that interesting subject.

§ 353. Lord Castlereagh's note.

It was now the second time that the powers of Europe had been compelled in vindication of their own liberties and for the settlement of the world, to invade France, and twice their armies had possessed themselves of the capital of the State, in which these, the spoils of the greater part of Europe, were accumulated. The legitimate sovereign of France had as often, under the protection of those armies, been enabled to resume his throne, and to mediate for his people a peace with the allies, to the marked indulgence of which neither their conduct to their own monarch, nor towards other States, had given them just pretensions to aspire. That the purest sentiments of regard for Louis XVIII., deference for his ancient and illustrious house, and respect for his misfortunes, had invariably guided the allied councils, had been proved beyond a

(*a*) [North American Review, April, 1872, p. 405.]

question, by their having, in 1814, framed the treaty of Paris on the basis of preserving to France its complete integrity; and still more, after their late disappointment, by the endeavours they were again making, ultimately to combine the substantial interests of France with such an adequate system of temporary precaution as might satisfy what they owed to the security of their own subjects. But it would be the height of weakness, as well as of injustice, and, in its effects much more likely to mislead than to bring back the people of France to moral and peaceful habits, if the allied sovereigns, to whom the world was anxiously looking up for protection and repose, were to deny that principle of integrity in its just and liberal application to other nations, their allies, (more especially to the feeble and the helpless,) which they were about, for a second time, to concede to a nation against which they had had occasion so long to contend in war. Upon what principle could France, at the close of the war, expect to sit down with the same extent of possessions which she held before the revolution, and desire, at the same time, to retain the ornamental spoils of all other countries? Was there any possible doubt of the issue of the contest, or of the power of the allies to effectuate what justice and policy required? If not, upon what principle would they deprive France of her late territorial acquisitions, and preserve to her the spoliations consisting of objects of art appertaining to those territories, which all modern conquerors had invariably respected, as inseparable from the country to which they belonged?

These remarks were amplified by a variety of considerations of political expediency, not necessary to be recapitulated, and the note concluded by declaring, that in applying a remedy to this offensive evil, it did not appear that any middle line could be adopted which did not go to recognize a variety of spoliations, under the cover of treaties, if possible more flagrant in their character than the acts of undisguised rapine by which these remains were, in general, brought together. The principle of property regulated by the claims of the territories from whence these works were taken, is the surest and only guide to justice; and perhaps there was nothing which would more tend to settle the public mind of Europe at this day, than such a homage on the part of the

King of France, to a principle of virtue, conciliation, and peace (*b*).

§ 354. Views of Sir S. Romilly.

In the debate which took place in the House of Commons, on the 20th of February, 1816, on the Peace with France, Sir Samuel Romilly, speaking incidentally of this proceeding, stated that he was by no means satisfied of its justice. It was not true that the works of art deposited in the museum of the Louvre, had all been carried away as the spoils of war; many, and the most valuable of them, had become the property of France by express treaty stipulations; and it was no answer to say that those treaties had been made necessary by unjust aggressions and unprincipled wars; because there would be an end of all faith between nations, if treaties were to be held not to be binding, because the wars out of which they arose were unjust, especially as there could be no competent judge to decide upon the justice of the war, but the nation itself. By whom, too, was it that this supposed act of justice and this "great moral lesson," as it was called, had been read? By the very powers who had, at different times, abetted France in these her unjust wars. Among other articles carried from Paris, under the pretence of restoring them to their rightful owners, were the celebrated Corinthian horses which had been brought from Venice; but how strange an act of justice was this to give them back their statues, but not to restore to them those far more valuable possessions, their territory and their republic, which were, at the same time, wrested from the Venetians? But the reason of this was obvious: the city and the territory of Venice had been transferred to Austria by the treaty of Campo Formio, but the horses had remained the trophy of France; and Austria, whilst she was thus hypocritically reading this moral lesson to nations, not only quietly retained the rich and unjust spoils she had got, but restored these splendid works of art, not to the Venice which had been despoiled of them, the ancient, independent, republican Venice; but to Austrian Venice—to that country which, in defiance of all the principles she pretended to be acting on, she still retained as part of her own dominions (*c*).

(*b*) Martens, Nouveau Recueil, tom. ii. p. 632.
(*c*) Life of Romilly, edited by his sons, vol. ii. p. 404.

§ 355. Distinction between private property, taken at sea, or on land.

The progress of civilization has slowly, but constantly, tended to soften the extreme severity of the operations of war by land; but it still remains unrelaxed in respect to maritime warfare, in which the private property of the enemy taken at sea or afloat in port, is indiscriminately liable to capture and confiscation. This inequality in the operation of the laws of war, by land and by sea, has been justified by alleging the usage of considering private property when captured in cities taken by storm, as booty; and the well-known fact that contributions are levied upon territories occupied by a hostile army, in lieu of a general confiscation of the property belonging to the inhabitants; and that the object of wars by land being conquest, or the acquisition of territory to be exchanged as an equivalent for other territory lost, the regard of the victor for those who are to be or have been his subjects, naturally restrains him from the exercise of his extreme rights in this particular; whereas, the object of maritime wars is the destruction of the enemy's commerce and navigation, the sources and sinews of his naval power—which object can only be attained by the capture and confiscation of private property.

§ 355a. Enemy's goods under a neutral flag.

The strictness of the rule subjecting all the enemy's property on the high seas to confiscation was somewhat modified by the Declaration of Paris, 1856, which provides, in its second article, that "The neutral flag covers enemy's goods, with the exception of contraband of war" (*d*). Almost all civilized powers, with the exception of the United States, are parties to this Declaration (*e*).

§ 355b. Capture of property on the high seas.

The indiscriminate seizure of private property on land would cause the most terrible hardship, without conferring any corresponding advantage on the invader. It cannot be effected without in some measure relaxing military discipline, and is sure to be accompanied by violence and outrage. On the other hand, the capture of merchant vessels is usually a bloodless act, most merchant vessels being incapable of resisting a ship of war. Again, property on land consists of endless varieties, much of it being absolutely useless for any hostile purpose, while property at sea is almost always purely merchandise, and thus is part of the enemy's strength. It is, moreover, embarked voluntarily, and with a knowledge of the risk incurred, and its loss can be covered by insurance (*f*). An invader on land can levy contributions or a war indemnity from a vanquished country, he can occupy part of its territory and appropriate its rates and taxes, and by these and other methods, he can

(*d*) [See Appendix G.]
(*e*) [Hertslet, Map of Europe, vol. ii. p. 1282.]
(*f*) [Wheaton, by Dana, n. 171.]

enfeeble the enemy and terminate the war. But in a maritime war, a belligerent has none of these resources, and his main instrument of coercion is crippling the enemy's commerce (*g*). If war at sea were to be restricted to the naval forces, a country possessing a powerful fleet would have very little advantage over a country with a small or with no fleet. If the enemy kept his ships of war in port, a powerful fleet, being unable to operate against commerce, would have little or no occupation (*h*). The United States proposed to add to the Declaration of Paris a clause exempting all private property on the high seas from seizure by public armed vessels of the other belligerent, except it be contraband; but this proposal was not acceded to (*i*). Nor does it seem likely, for the reasons stated above, that maritime nations will forego their rights in this respect.

§ 355c. What are enemy's goods.

It is often a matter of difficulty for a prize court to determine to whom property captured at sea actually belongs. The general rule is that if goods are shipped on account and at the risk of the consignee, they are considered his goods during the voyage. In such a case delivery of the goods to the master is a delivery to the consignee (*k*). In time of peace the parties may of course agree to any terms they please, as to whose risk the property should be at during the voyage, but in time of war, or in contemplation of war, the rule of prize courts is, that property which has a hostile character at the commencement of the voyage, cannot change that character by assignment while it is *in transitu*, so as to protect it from capture (*l*). Unless such a rule were adopted, all property passing between a neutral and a belligerent would be colourably assigned to the neutral, and the belligerent right of capture would be comparatively worthless. It is therefore the duty of a prize court to ascertain in whom the property was vested at the outset of the voyage, and in this inquiry all equitable liens on enemy's property are disregarded, and all revelations of risk to neutral consignors are held to be fraudulent (*m*). On the other hand, enemy's liens on neutral property are equally disregarded, being held not to confer such an enemy character on the ship or goods as to subject them to confiscation (*n*). If, however, the shipment as well as the contract, laying the risk on the neutral consignor, were both made in time of peace, and are proved to have been *bonâ fide*, and not in contemplation of war, the ownership which was in the neutral consignor at the beginning of the voyage remains in him until its termination, and the goods will not be condemned (*o*). Nor are they condemned when shipped by an enemy

(*g*) [Ortolan, Diplomatie de la Mer, liv. iii. ch. ii.]

(*h*) [Field, Int. Code (2nd ed.) p. 527.]

(*i*) [Halleck, ch. xx. § 3.]

(*k*) [*The Packet de Bilboa*, 2 C. Rob. 133. Duer on Insurance, vol. i. pp. 421—2.]

(*l*) [Kent, Comm. vol. i. p. 86 (12th ed.) Duer on Insurance, vol. i. p. 431 *The Francis*, 1 Gallison, 445.]

(*m*) [Kent, vol. i. p. 87 (12th ed.). *The Josephine*, 4 C. Rob. 75; *The Tobago*, 5 C. Rob. 218; *The Marianna*, 6 C. Rob. 24; *The Ida*, 1 Spinks, 26.]

(*n*) [*The Ariel*, 11 Moo. P. C 119.]

(*o*) [Halleck, ch. xx. § 9. Duer on Insurance, i. p. 425. *The Atlas*, 3 C. Rob. 299.]

during war, if it is proved beyond all doubt that they were shipped absolutely at the risk of a neutral consignee. Such transactions are, however, carefully scrutinized in a prize court (*p*). The only case in which the right of *stoppage in transitu* can be exercised during war is in the expectation, confirmed by the event, of the insolvency of the consignee (*q*).

§ 355 d. Sale of ships by belligerents to neutrals.

The transfer of ships from belligerents to neutrals during war, is always looked upon very suspiciously, and clear proof of *bona fides* is required to save the ship from condemnation (*r*). Thus, a British ship alleged to have been sold to a neutral after hostilities had broken out between England and Holland, was captured while trading between Guernsey and Amsterdam under the command of her former master, who had also been the owner. She was condemned as prize for trading with the enemy, the transfer being deemed colourable and void (*s*). But if the sale of a ship by a belligerent to a neutral be absolute and *bonâ fide*, it is then permitted either during war or in contemplation of it, and whether she is lying in an enemy or a neutral port. All interest of the vendor in the ship must be completely divested, but the mere non-payment of part of the price is not conclusive evidence of itself that the vendor's interest is not entirely transferred (*t*). Vessels of war lying in neutral ports cannot be sold by their belligerent owners at any time during the war. If so sold, a ship of war, even though purchased in good faith, and fitted up as a merchant vessel, remains liable to capture by the other belligerent as long as the war lasts (*u*). Capture as prize overrides all previous liens (*v*), and it gives the captor all the owner's rights when the voyage began (*x*). Even a *bonâ fide* mortgagee, a subject of the captor's country, is not entitled to have his mortgage paid out of the proceeds of the sale of the prize (*y*).

§ 356. What persons are authorized to engage in hostilities against the enemy.

The effect of a state of war, lawfully declared to exist, is to place all the subjects of each belligerent power in a state of mutual hostility. The usage of nations has modified this maxim by legalising such acts of hostility only as are committed by those who are authorized by the express or implied command of the State. Such are the regularly commissioned naval and military forces of the nation, and all others called out in its defence, or spontaneously defending themselves in cases of urgent necessity, without any express authority for

(*p*) [Halleck, ch. xx. § 10. Duer on Insurance, i. p. 426. *The Aurora*, 4 C. Rob. 219.]

(*q*) [Duer on Insurance, i. p. 433. *The Constancia*, 6 C. Rob. 324; *Oppenheim* v. *Russel*, 3 Bos. & Pul. 484.]

(*r*) [Duer, i. p. 444.]

(*s*) [*The Omnibus*, 6 C. Rob. 71; *The Odin*, 1 C. Rob. 252.]

(*t*) [*The Ariel*, 11 Moo. P. C. 129; *The Sechs Geschwistern*, 4 C. Rob. 100.]

(*u*) [*The Georgia*, 7 Wallace, 32.]

(*v*) [*The Battle*, 6 Wallace, 498; *The Steamer Nassau*, Blatchford Prize Cas. 665; *The Ida*, 1 Spinks, 35.]

(*x*) [*The Sally Magee*, 3 Wallace, 451.]

(*y*) [*The Hampton*, 5 Wallace, 372. *Le Turner*, Barboux, Jurisp. du Conseil des Prises, 1870—71, p. 75. *The Aina*, 1 Spinks, 19.]

that purpose. *Cicero* tells us, in his *Offices*, that by the Roman fecial law, no person could lawfully engage in battle with the public enemy, without being regularly enrolled and taking the military oath. This was a regulation sanctioned both by policy and religion. The horrors of war would indeed be greatly aggravated, if every individual of the belligerent States was allowed to plunder and slay indiscriminately the enemy's subjects without being in any manner accountable for his conduct. Hence it is that in land wars, irregular bands of marauders are liable to be treated as lawless banditti, not entitled to the protection of the mitigated usages of war as practised by civilized nations (*z*).

§ 357. Non-commissioned captors.

It must probably be considered as a remnant of the barbarous practices of those ages when maritime war and piracy were synonymous, that captures made by private armed vessels without a commission, not merely in self-defence, but even by attacking the enemy, are considered lawful, not indeed for the purpose of vesting the enemy's property thus seized in the captors, but to prevent their conduct from being regarded as piratical, either by their own government or by the other belligerent State. Property thus seized is condemned to the government as prize of war, or, as these captures are technically called, Droits of Admiralty. The same principle is applied to the captures made by armed vessels commissioned against one power, when war breaks out with another; the captures made from that other are condemned, not to the captors, but to the government (*a*).

§ 358. Privateers.

The practice of cruising with private armed vessels commissioned by the State, has been hitherto sanctioned by the laws of every maritime nation, as a legitimate means of destroying the commerce of an enemy. The practice has been justly arraigned as liable to gross abuses, as tending to encourage a spirit of lawless depredation, and as being in glaring contradiction to the more mitigated modes of warfare practised by land. Powerful efforts have been made by humane and enlightened individuals to suppress it, as incon-

(*z*) Vattel, Droit des Gens, liv. iii. ch. 15, §§ 223—228. Klüber, Droit des Gens Moderne de l'Europe, § 267.

(*a*) Brown's Civ. and Adm. Law, vol. ii. p. 526, Appendix. *The Abigail*, 4 C. Rob. 72. *The Georgiana*, 1 Dods. Ad. 397. Sparks's Diplomatic Correspondence, vol. i. p. 443. Wheaton's Rep. vol. ii. Appendix, Note I. p. 7.

sistent with the liberal spirit of the age. The treaty negotiated by Franklin, between the United States and Prussia, in 1785, by which it was stipulated that, in case of war, neither power should commission privateers to depredate upon the commerce of the other, furnishes an example worthy of applause and imitation. But this stipulation was not revived on the renewal of the treaty, in 1799; and it is much to be feared that, so long as maritime captures of private property are tolerated, this particular mode of injuring the enemy's commerce will continue to be practised, especially where it affords the means of countervailing the superiority of the public marine of an enemy (*b*).

§ 358a. Abolition of privateering.

The first article of the Declaration of Paris recites that "Privateering is and remains abolished." Spain and Mexico, though parties to the rest of the Declaration, have not acceded to this article, and although various attempts have been made to induce the United States to become an accessory, that power is as yet not bound by any part of the Declaration (*c*). During the American civil war, Congress authorized the President to issue letters of marque, but he did not avail himself of this power. The Confederates offered their letters of marque to foreigners, but the restrictive legislation of the maritime powers, and the threat of the United States of treating such vessels as pirates, prevented their being accepted. The ostensibly Confederate vessels were commissioned as of its regular navy (*d*).

§ 359. Title to property captured in war.

The title to property lawfully taken in war may, upon general principles, be considered as immediately divested from the original owner, and transferred to the captor. This general principle is modified by the positive law of nations, in its application both to personal and real property. As to personal property or moveables, the title is, in general, considered as lost to the former proprietor as soon as the enemy has acquired a firm possession; which, as a general rule, is considered as taking place after the lapse of twenty-four hours, or after the booty has been carried into a place of safety, *infra præsidia* of the captor (*e*).

(*b*) Vattel, liv. iii. ch. 15, § 229. Franklin's Works, vol. ii. pp. 447, 530. Edinburgh Review, vol. viii. pp. 13—15. North American Review, vol. ii. (N. S.) pp. 166 -196. Wheaton's Hist. Law of Nations, p. 308.

(*c*) [See Appendix G, p. 732.]

(*d*) [Wheaton, by Dana, n. 173.]

(*e*) Grotius, de Jur. Bel. ac Pac. lib. iii. cap. 6, § 3; cap. 9, § 14. Klüber, Droit des Gens Moderne de l'Europe, § 254. Vattel, Droit des Gens, liv. iii. ch 13, § 196; ch. 14, § 209. Heffter, Das Europaische Volkerrecht, § 136.

§ 359a. Booty and prize.

Property of the enemy taken on land is usually called *booty*, while that captured on the high seas has acquired the name of *prize* (*f*). There is a very important distinction between them as regards the mode in which the captor acquires a title to the captured property. As stated in the text, booty belongs to the captor as soon as he has acquired a firm possession of it. No adjudication of any court is necessary to establish his title (*g*). On the other hand, a title to prize is acquired, as a general rule, only after the property has been condemned by a competent court (*h*). By the modern usage of nations neither the twenty-four hours' possession, nor the bringing the prize *infra præsidia*, is sufficient to change the property in the case of a maritime capture. Until the capture becomes invested with the character of prize by a sentence of condemnation, the right of property is in abeyance, or in a state of legal sequestration (*i*). Ships and their cargoes are not invariably prize. Thus during the American civil war a ship captured in a river by a detached naval force in boats was held not to be maritime prize, or to be condemned as such (*k*).

§ 359b. Prize and booty belong primarily to the sovereign.

The primary title to all property taken in war, whether on land or at sea, is in the sovereign (*l*). The law of England on this point has been thus laid down by Lord Brougham :—"That prize is clearly and distinctly the property of the Crown, that the sovereign in this country, the executive government in all countries, in whom is vested the power of levying the forces of the State, and of making war and peace, is alone possessed of all property in prize, is a principle not to be disputed. It is equally incontestable that the Crown possesses this property *pleno jure* absolutely and wholly without control ; that it may deal with it entirely at its pleasure, may keep it for its own use, may abandon or restore it to the enemy, or, finally, may distribute it in whole or in part among the persons instrumental in its capture, making that distribution according to whatever scheme, and under whatever regulations and conditions it sees fit. It is equally clear, and it follows from the two former propositions, that the title of a party claiming prize must needs in all cases be the act of the Crown, by which the royal pleasure to grant the prize shall have been signified to the subject; whether, even in that case, the same paramount and transcendent power of the Crown might not enure to the effect of preserving to His Majesty the right of modifying, or altogether revoking, the grant, is a question which has never yet arisen, and which, when it does arise, will be found never to have been determined in the negative. But this, at all events, is clear, that when the Crown, by an act of grace and bounty, parts, for certain purposes, and subject to certain modifications, with the property in prize, it by that act plainly signifies its intention that the prize shall continue

(*f*) [*Genoa and its Dependencies*, 2 Dods. Ad. 446.]
(*g*) [*Lamar* v. *Browne*, 2 Otto, 195.]
(*h*) [Opinions of Att.-Gen. (U. S.) vol. iii. p. 379. Field, International Code, § 896. *Goss* v. *Withers*, 2 Burrows, 693.]
(*i*) [Kent, vol. i. p. 103 (12th ed.) Tudor, Leading Cases on Maritime Law, pp. 819—821. Calvo, ii. § 1236.]
(*k*) [*The Cotton Plant*, 10 Wallace, 577.]
(*l*) [Phillimore, vol. iii. § cxxx. Calvo, ii. § 1237. Halleck, ch. xxx. § 3.]

subject to the power of the Crown, and as it was before the act was done.

"This doctrine has been frequently recognized in cases where the question has arisen subsequently to the capture, and before condemnation; but the same principle was afterwards extended in the case of the *Elsebe* (*m*), at the cockpit, in which, after final adjudication in the Court below, but pending an appeal, the Crown thought proper, for reasons of State and public policy, to restore the prize at the expense of the captors. In other words, it was then determined, and that too upon a solemn and most able argument, and by a judge the most learned and eminent of his time, the present Lord Stowell, that when the Crown saw fit to restore the capture, the captors, who had run the risk and suffered the loss, who had, moreover, borne the charge of bringing the prize into port, and the further costs of proceeding in the Admiralty to adjudication, and had even undergone additional expenses in contesting their claim upon appeal, were altogether without a remedy. 'It is admitted,' says Lord Stowell—in language which it would be vain to praise or to attempt to imitate—'it is admitted on the part of the captors, whose interests have been argued with great force (and not the less effective, surely, for the extreme decorum with which that force has been tempered) that their claim rests wholly on the Order of Council, the Proclamation, and the Prize Act. It is not, as it cannot be, denied that, independent of these instruments, the whole subject-matter is in the hands of the Crown, as well in point of interest as in point of authority. Prize is altogether a creature of the Crown. No man has, or can have, any interest but what he takes as the mere gift of the Crown; beyond the extent of that gift he has nothing. This is the principle of law on the subject, and founded on the wisest reasons. The right of making war and peace is exclusively in the Crown. The acquisitions of war belong to the Crown, and the disposal of these acquisitions may be of the utmost importance for the purposes both of war and peace. This is no peculiar doctrine of our constitution; it is universally received as a necessary principle of public jurisprudence by all writers on the subject, *Bello parta cedunt reipublicæ*'" (*n*).

§ 359c. Duties of captors.

On the completion of a capture it is the duty of the captor to bring his prize, as soon as his other duties permit it, before a competent court (*o*). Since the property in a prize is in abeyance until a competent court has pronounced upon the capture, it is the interest of all parties to obtain a judicial decree as soon as possible. As the custody of the prize remains with the captor, it therefore lies upon him to bring it before the Court. But if prevented by imperious circumstances from bringing it to his own country, he may be excused for taking it to a foreign port, or for selling it, provided he afterwards reasonably subjects its proceeds to the Court (*p*). By unreasonable delay in bringing in the prize for

(*m*) [5 C. Rob. 173.]

(*n*) [*Alexander* v. *The Duke of Wellington*, 2 Russell & Mylne, 54. Lord Stowell's remarks are to be found in *The Elsebe*, 5 C. Rob. 581.]

(*o*) [Phillimore, vol. iii. § 341.]

(*p*) [Halleck, ch. xxx. § 5. *The Peacock*, 4 C. Rob. 192.]

adjudication, or by other misconduct, the captor may forfeit all his right of prize, and in this case the prize is condemned to the State, if the capture was originally lawful(*q*). If the capture was made entirely without probable cause, the captor is liable for costs, and for the damages resulting from the illegal seizure, and the latter are decreed to the injured owner (*r*).

§ 359 d. Destruction of prizes at sea.

"Sometimes," says Chancellor Kent, "circumstances will not permit property captured at sea to be sent into port; and the captor in such cases may destroy it, or permit the original owner to ransom it" (*s*). If the vessel belong to the enemy, and the captor has no means of retaining possession of her, or of bringing her into port, he is then justified in destroying her, but it is his duty to preserve her papers and as much of the cargo as he can secure. The Confederate cruisers burnt many of their prizes at sea during the civil war, as their own ports were all blockaded by the Federal fleets; and though this was not a proceeding to be approved of, it was not a violation of international law (*t*). At the conclusion of the war the Federal government wished to proceed against Captain Semmes of *The Alabama* for burning and destroying ships and cargoes belonging to American citizens. They could not indict him for high treason as he had been treated as a prisoner of war. But no proceedings were actually taken. Mr. Bolles, the law officer to whom the case was referred, gave it as his opinion that Captain Semmes had done no more than the United States had themselves done to England in the war of 1812-14. During that war orders had been given that no prize should be manned or preserved unless circumstances should render her safe arrival morally certain. No prizes were to be ransomed, and almost all were to be destroyed. Mr. Bolles also pointed out that it might be the policy of the Union to pursue a similar course in some future war, and therefore he deemed it improper to prosecute a person who had, under orders, simply followed an example previously set by the government (*u*).

Destruction of Turkish vessels by Russian steamers.

During the recent war with Turkey, Russia was alleged to have made a practice of sending out fast steamers from Odessa, which, while they avoided the Turkish cruisers, captured Turkish merchantmen, burnt them on the spot, and then set the crews adrift in boats. If this was true, it was an undeniable violation of international law. It was, moreover, an act of wanton and unnecessary cruelty to burn the ships and then expose the lives of their crews in open boats, and it was an act which could only influence the war by exasperating the other side, and inducing it to retaliate by similar measures (*x*).

§ 359 e. Destruction

If the prize is a neutral ship, no circumstances will justify her destruc-

(*q*) [*The Bothnea*, 2 Gallison, 78; *The Triton*, 4 C. Rob. 78. Phillimore, vol. iii. § 381. *Miller* v. *The Resolution*, 2 Dallas, 1.]

(*r*) [Halleck, ch. xxx. § 29. Phillimore, vol. iii. § 452. *Del Col* v. *Arnold*, 3 Dallas, 333. *The Anna Maria*, 2 Wheaton, 327.]

(*s*) [Kent, by Abdy, p. 276.]

(*t*) [Montague Bernard, Neutrality of England during Civil War, p. 419. Lushington, Manual of Naval Prize Law, § 101.]

(*u*) [Atlantic Monthly, July, 1866, p. 89. Parl. papers, 1873 (No. 2), p. 92.]

(*x*) [See Parl. Papers. Turkey (No. 1), 1878, p. 313; and the *Times*, 15th Dec. 1877.]

tion before condemnation. The only proper reparation to the neutral is to pay him the full value of the property destroyed (y). Neutral cargoes are not always equally privileged. In 1870 the *Desaix*, a French cruiser, captured two German vessels, the *Ludwig* and the *Norwaerts*, and burnt them on the day of capture. Part of the cargo of these vessels belonged to neutral owners (British subjects), and was therefore under the express protection of the third article of the Declaration of Paris. The owners claimed compensation for the destruction of their goods, but the *Conseil d'État*, in a judgment delivered by the President of the French Republic, held that though the Declaration of Paris exempts the goods of a neutral on board an enemy's ship from confiscation, and entitles the owner to their proceeds in case of a sale, yet it gives him no claim to compensation for any damage resulting from the lawful capture of the ship, or from any subsequent and justifiable proceedings of the captors. As the destruction of the two vessels was held to have been necessary under the circumstances, no compensation was awarded to the owners of the neutral cargo (z). of neutral ship or cargo.

As to ships and goods captured at sea, and afterwards recaptured, rules are adopted somewhat different from those which are applicable to other personal property. These rules depend upon the nature of the different classes of cases to which they are to be applied. Thus the recapture may be made either from a pirate; from a captor, clothed with a lawful commission, but not an enemy; or, lastly, from an enemy. § 360. Re-captures and salvage.

1. In the first case, there can be no doubt the property ought to be restored to the original owner; for as pirates have no lawful right to make captures, the property has not been divested. The owner has merely been deprived of his possession, to which he is restored by the recapture. For the service thus rendered to him, the recaptor is entitled to a remuneration in the nature of salvage (a). § 361. Re-captures from pirates.

Thus, by the Marine ordinance of Louis XIV., of 1681, liv. iii. tit. 9, des Prises, art 10, it is provided, that the ships and effects of the subjects or allies of France, retaken from pirates, and claimed within a year and a day after being reported at the Admiralty, shall be restored to the owner, upon payment

(y) [Twiss, International Law during War, § 167, p. 331. *The Felicity*, 2 Dods. Ad. 386.]

(z) [Dalloz, Jurisprudence Générale, 1872, Pt. III. p. 94.]

(a) Grotius, de Jur. Bel. ac Pac. lib. iii. cap. 9, § 17. Loccenius, de Jur. Marit. lib. ii. c. 2, No. 4. Brown's Civ. and Adm. Law, vol. ii. c. 3, p. 461. "Ea quæ piratæ nobis eripuerunt, non opus habent postliminio; quia jus gentium illis non concedit, ut jus dominii mutari possint." Dig. de Capt. et Postl. revers.

of one third of the value of the vessel and goods, as salvage. And the same is the law of Great Britain, but there is no doubt that the municipal law of any particular State may ordain a different rule as to its own subjects. Thus the former usage of Holland and Venice gave the whole property to the retakers, on the principle of public utility; as does that of Spain, if the property has been in the possession of the pirates twenty-four hours (*b*).

§ 362. Opinions of Valin and Pothier.

Valin, in his commentary upon the above article of the French Ordinance, is of opinion that if the recapture be made by a foreigner, who is the subject of a State, the law of which gives to the recaptors the whole of the property, it could not be restored to the former owner: and he cites, in support of this opinion, a decree of the Parliament of Bordeaux, in favour of a Dutch subject, who had retaken a French vessel from pirates (*c*). To this interpretation Pothier objects that the laws of Holland having no power over Frenchmen and their property within the territory of France, the French subject could not thereby be deprived of the property in his vessel, which was not divested by the piratical capture according to the law of nations, and that it ought consequently to be restored to him upon payment of the salvage prescribed by the ordinance (*d*).

Under the term *allies* in this article are included *neutrals;* and Valin holds that the property of the subjects of friendly powers, retaken from pirates by French captors, ought not to be restored to them upon the payment of salvage, if the law of their own country gives it wholly to the retakers; otherwise there would be a defect of reciprocity, which would offend against that impartial justice due from one State to another (*e*).

§ 363. Re-capture of neutral property.

2. If the property be retaken from a captor clothed with a lawful commission, but not an enemy, there would still be as little doubt that it must be restored to the original owner. For the act of taking being in itself a wrongful act, could not change the property, which must still remain in him.

If, however, the neutral vessel thus recaptured, were laden

(*b*) Grotius, par Barbeyrac, liv. 3, ch. 9, § xvi. No. 1, and note.
(*c*) Valin, Comm. sur l'Ord. liv. 3, tit. 9, art. 10.
(*d*) Pothier, Traité de Propriété, No. 101.
(*e*) Valin, Comm. sur l'Ord. liv. 3, tit. 9, art. 10.

with contraband goods destined to an enemy of the first captor, it may, perhaps, be doubted whether they should be restored, inasmuch as they were liable to be confiscated as prize of war to the first captor. Martens states the case of a Dutch ship, captured by the British, under the rule of the war of 1756, and recaptured by the French, which was adjudged to be restored by the Council of Prizes, upon the ground that the Dutch vessel could not have been justly condemned in the British prize courts. But if the case had been that of a trade, considered contraband by the law of nations and treaties, the original owner would not have been entitled to restitution (*f*).

§ 364. No salvage on capture of neutral.

In general, no salvage is due for the recapture of neutral vessels and goods, upon the principle that the liberation of a *bonæ fidæi* neutral from the hands of the enemy of the captor is no beneficial service to the neutral, inasmuch as the same enemy would be compelled by the tribunals of his own country to make restitution of the property thus unjustly seized.

§ 365. The case of *The Statira.*

It was upon this principle that the French Council of Prizes determined, in 1800, that the American ship *Statira*, captured by a British, and recaptured by a French cruiser, should be restored to the original owner, although the cargo was condemned as contraband or enemy's property. The sentence of the Court was founded upon the conclusions of M. Portalis, who stated that the recapture of foreign neutral vessels by French cruisers, whether public ships or privateers, gave no title to the retakers. The French prize-code only applied to French vessels and goods recaptured from the enemy. According to the universal law of nations, a neutral vessel ought to be respected by all nations. If she is unjustly seized by the cruisers of any one belligerent nation, this is no reason why another should become an accomplice in this act of injustice, or should endeavour to profit by it. From this maxim it followed as a corollary that a foreign vessel, asserted to be neutral, and recaptured by a French cruiser from the enemy, ought to be restored on due proof of its neutrality. But, it

(*f*) Martens, Essai sur les Prises et les Reprises, § 52. "Sa majesté a jugé pendant la dernière guerre, que la reprise du navire neutre faite par un corsaire français (lorsque le navire n'était pas chargé de marchandises prohibées, ni dans le cas d'être confisqué par l'ennemi) était nulle." Code des Prises, an 1784, tom. ii.

might be asked, why treat a foreign vessel with more favour in this case than a French vessel? The reason was obvious. On the supposition on which the regulations relating to this matter were founded, the French ship fallen into the hands of the enemy would have been lost for ever, if it had not been retaken; consequently the recapture is a prize taken from the enemy. If the case, however, be that of a foreign vessel, asserted to be neutral, the seizure of this vessel by the enemy does not render it *ipso facto* the property of the enemy, since its confiscation has not yet been pronounced by the competent judge; until that judgment has been pronounced, the vessel thus navigating under the neutral flag loses neither its national character nor its rights. Although it has been seized as prize of war, it may ultimately be restored to the original owner. Under such circumstances, the recapture of this vessel cannot transfer the property to the recaptor. The question of neutrality remains entire, and must be determined, before such a transmutation of property can take place. Such was the language of all public jurists, and such was the general usage of all civilized nations. It followed that the vessel in question was not confiscable by the mere fact of its having been captured by the enemy. Before such a sentence could be pronounced, the French tribunal must do what the enemy's tribunal would have done; it must determine the question of neutrality; and that being determined in favour of the claimant, restitution would follow of course (*g*).

§ 366. Exception when ship might have been confiscated by the enemy.

To this general rule, however, an important exception has been made, founded on the principle above quoted from the Code des Prises, in the case where the vessel or cargo recaptured was practically liable to be confiscated by the enemy. In that case, it is immaterial whether the property be justly liable to be thus confiscated according to the law of nations; since that can make no difference in the meritorious nature of the service rendered to the original owner by the recaptor. For the ground upon which salvage is refused by the general rule, is, that the prize court of the captor's country will duly respect the obligations of that law; a presumption which, in the wars of civilized States, as they are usually carried on,

(*g*) Décision relative à la prise du navire *Le Statira*, 6 Thermidor, an 8, pp. 2—4.

each belligerent nation is bound to entertain in its dealings with neutrals. But if, in point of fact, those obligations are not duly observed by those tribunals, and, in consequence, neutral property is unjustly subjected to confiscation in them, a substantial benefit is conferred upon the original owner in rescuing his property from this peril, which ought to be remunerated by the payment of salvage. It was upon this principle that the Courts of Admiralty, both of Great Britain and the United States, during the maritime war which was terminated by the peace of Amiens, pronounced salvage to be due upon neutral property retaken from French cruisers. During the revolution in France, great irregularity and confusion had arisen in the prize code formerly adopted, and had crept into the tribunals of that country, by which neutral property was liable to condemnation upon grounds both unjust and unknown to the law of nations. The recapture of neutral property which might have been exposed to confiscation by means of this irregularity and confusion, was, therefore, considered by the American and British courts of prize, as a meritorious service, and was accordingly remunerated by the payment of salvage (*h*). These abuses were corrected under the consular government, and so long as the decisions of the Council of Prizes were conducted by that learned and virtuous magistrate, M. Portalis, there was no particular ground of complaint on the part of neutral nations as to the practical administration of the prize code until the promulgation of the Berlin decree in 1806. This measure occasioned the exception to the rule as to salvage to be revived in the practice of the British Courts of Admiralty, who again adjudged salvage to be paid for the recapture of neutral property which was liable to condemnation under that decree (*i*). It is true that the decree had remained practically inoperative upon American property, until the condemnation of the cargo of *The Horizon* by the Council of Prizes, in October, 1807; and therefore it may perhaps be thought, in strictness, that the English Court of Admiralty ought not to have decreed salvage in the case of

(*h*) *The War Onskan*, 2 C. Rob. 299; *The Eleonora Catherina*, 4 Ib. 156; *The Carlotta*, 5 Ib. 54; *The Huntress*, 6 Ib. 104; *Talbot* v. *Seeman*, 1 Cranch, 1; S. C. 4 Dallas, 34.

(*i*) *The Sanson*, 6 C. Rob. 410; *The Acteon*, Edw. Ad. 254.

The Sansom, more especially as the convention of 1800, between the United States and France, was still in force, the terms of which were entirely inconsistent with the provisions of the Berlin decree. But as the cargo of *The Horizon* was condemned in obedience to the imperial rescript of the 18th September, 1807, having been taken before the capture of *The Sansom*, whether that rescript be considered as an interpretation of a doubtful point in the original decree, or as a declaration of an anterior and positive provision, there can be no doubt *The Sansom* would have been condemned under it; consequently a substantial benefit was rendered to the neutral owner by the recapture, and salvage was due on the principle of the exception to the general rule. And the same principle might justly be successively applied to the prize proceedings of all the belligerent powers during the last European war, which was characterized by the most flagrant violations of the ancient law of nations, which, in many cases, rendered the rescue of neutral property from the grasp of their cruisers and prize courts, a valuable service entitling the recaptor to a remuneration in the shape of salvage.

§ 367. Recapture from an enemy.

3. Lastly, the recapture may be made from an enemy.

The *jus postliminii* was a fiction of the Roman law, by which persons or things taken by the enemy were held to be restored to their former state, when coming again under the power of the nation to which they formerly belonged. It was applied to free persons or slaves returning *postliminii;* and to real property and certain moveables, such as ships of war and private vessels, except fishing and pleasure boats. These things, therefore, when retaken, were restored to the original proprietor, as if they had never been out of his control and possession (*k*). Grotius attests, and his authority is supported by that of the Consolato del Mare, that by the ancient maritime law of Europe, if the thing captured were carried *infra præsidia* of the enemy, the *jus postliminii* was considered as forfeited, and the former owner was not entitled to restitution. Grotius also states, that by the more recent law established among the European nations, a possession of twenty-four hours was deemed sufficient to divest the property

(*k*) Inst. lib. i. tit. 12; Dig. l. 49, tit. 15. "Navis longis atque onerariis, postliminium est, non piscatûs aut voluptatis causâ." Dig. 49.

of the original proprietor, even if the captured thing had not been carried *infra præsidia* (*l*). And Loccenius considers the rule of twenty-four hours' possession as the general law of Christendom at the time when he wrote (*m*). So, also, Bynkershoek states the general maritime law to be, that if a ship or goods be carried *infra præsidia* of the enemy, or of his ally, or of a neutral, the title of the original proprietor is completely divested (*n*).

§ 368. Rule of amicable retaliation, or reciprocity, applied to recaptures of the property of allies.

Sir W. Scott, in delivering the judgment of the English Court of Admiralty, in the case of *The Santa Cruz* and other Portuguese vessels recaptured, in 1796 and 1797, from the common enemy by a British cruiser, stated that it was certainly a question of much curiosity to inquire what was the true rule on this subject. "When I say *the true rule*, I mean only the rule to which civilized nations, attending to just principles, ought to adhere; for the moment you admit, as admitted it must be, that the practice of nations is various, you admit that there is no rule operating with the proper force and authority of a general law. It may be fit there should be some rule, and it might be either the rule of immediate possession, or the rule of pernoctation and twenty-four hours' possession; or it might be the rule of bringing *infra præsidia;* or it might be a rule requiring an actual sentence or condemnation: either of these rules might be sufficient for general practical convenience, although in theory perhaps one might appear more just than another; but the fact is that there is no such rule of practice. Nations concur in principles, indeed, so far as to require firm and secure possession; but these rules of evidence respecting that possession are so discordant, and lead to such opposite conclusions, that the mere unity of principle forms no uniform rule to regulate the general practice. But were the public opinion

(*l*) "Cui consequens esse videtur, ut in mari naves, et res aliæ captæ censeantur tum demum, cùm in navalia aut portus, aut ad eum locum ubi tota classis se tenet, perducta sunt: nam tunc desperari incipit recuperatio, sed *recentiori jure gentium* inter Europæos populos introductum, videmus, ut talia capta censeantur ubi per horas viginti quatuor in potestate hostium fuerint." Grotius, de Jur. Bel. ac Pac. lib. iii. cap. 6, § 3. Consolato del Mare, cap. 287, § 1. Wheaton's Rep. vol. v. Appendix, p. 56. Ayala, de Jur. Bel. ac Pac. cap. v. Wheaton's Hist. Law of Nations, p. 45.

(*m*) Loccenius, de Jure Marit. lib. ii. cap. 4, § 4.

(*n*) Bynkershoek, Quæst. Jur. Pub. lib. i. cap. 5.

of European States more distinctly agreed on any principle, as fit to form the rule of the law of nations on this subject, it by no means follows that any one nation would lie under an obligation to observe it. That obligation could only arise from a reciprocity of practice in other nations; for, from the very circumstance of the prevalence of a different rule among other nations, it would become not only lawful, but necessary to that one nation to pursue a different conduct: for instance, were there a rule prevailing among other nations, that the immediate possession, and the very act of capture should divest the property from the first owner, it would be absurd in Great Britain to act towards them on a more extended principle, and to lay it down as a general rule, that a bringing *infra præsidia,* though probably the true rule, should in all cases of recapture be deemed necessary to divest the original proprietor of his right. The effect of adhering to such a rule would be gross injustice to British subjects; and a rule, from which gross injustice must ensue in practice, can never be the true rule of law between independent nations; for it cannot be supposed to be the duty of any country to make itself a martyr to speculative propriety, were that established on clearer demonstration than such questions will generally admit. Where mere abstract propriety, therefore, is on one side, and real practical justice on the other, the rule of substantial justice must be held to be the true rule of the law of nations between independent States.

§ 369. Opinion of Sir W. Scott in *The Santa Cruz.*

"If I am asked, under the known diversity of practice on this subject, what is the proper rule for a State to apply to the recaptured property of its allies? I should answer that the liberal and rational proceeding would be to apply in the first instance the rule of that country to which the recaptured property belongs. I admit the practice of nations is not so; but I think such a rule would be both liberal and just. To the recaptured, it presents his own consent, bound up in the legislative wisdom of his own country: to the recaptor, it cannot be considered as injurious,—where the rule of the recaptured would condemn, whilst the rule of the recaptor prevailing among his own countrymen would restore, it brings an obvious advantage; and even in case of immediate restitution, under the rules of the recaptured, the recapturing

country would rest secure in the reliance of receiving reciprocal justice in its turn.

"It may be said, what if this reliance should be disappointed?—Redress must then be sought from retaliation; which, in the disputes of independent States, is not to be considered as vindictive retaliation, but as the just and equal measure of civil retribution. This will be their ultimate security, and it is a security sufficient to warrant the trust. For the transactions of States cannot be balanced by minute arithmetic; something must, on all occasions, be hazarded on just and liberal presumption.

"Or it may be asked, what if there is no rule in the country of the recaptured?—I answer, first, this is scarcely to be supposed; there may be no ordinance, no prize acts immediately applying to recapture; but there is a law of habit, a law of usage, a standing and known principle on the subject, in all civilized commercial countries: it is the common practice of European States, in every war, to issue proclamations and edicts on the subject of prize; but till they appear, Courts of Admiralty have a law and usage on which they proceed, from habit and ancient practice, as regularly as they afterwards conform to the express regulations of their prize acts. But secondly, if there should exist a country in which no rule prevails,—the recapturing country must of necessity apply its own rule, and rest on the presumption that *that* rule will be adopted and administered in the future practice of its allies.

"Again, it is said that a country applying to other countries their own respective rules, will have a practice discordant and irregular: it may be so, but it will be a discordance proceeding from the most exact uniformity of principle; it will be *idem per diversa.* If it is asked, also, will you adopt the rules of Tunis and Algiers? If you take the people of Tunis and Algiers for your allies, undoubtedly you must; you must act towards them on the same rules of relative justice on which you conduct yourselves towards other nations. And upon the whole of these objections it is to be observed, that a rule may bear marks of apparent inconsistency, and yet contain much relative fitness and propriety; a regulation may be extremely unfit to be made, which yet shall

be extremely fit, and shall indeed be the only fit rule to be observed towards other parties, who have originally established it for themselves.

"So much it might be necessary to explain myself on the mere question of propriety; but it is much more material to consider, what is the actual rule of the maritime law of England on this subject. I understand it to be clearly this, that the maritime law of England, having adopted a most liberal rule of restitution or salvage with respect to the recaptured property of its own subjects, gives the benefit of that rule to its allies, till it appears that they act towards British property on a less liberal principle. In such a case, it adopts their rule, and treats them according to their own measure of justice. This I consider to be the true statement of the law of England on this subject: It was clearly so recognised in the case of *The San Jago;* a case which was not, as it has been insinuated, decided on special circumstances, nor on novel principles, but on principles of established use and authority in the jurisprudence of this country. In the discussion of that case, much attention was paid to an opinion found among the manuscript collections of a very distinguished practitioner in this profession (Sir E. Simpson), which records the practice and the rule as it was understood to prevail in his time. The rule is: that England restores, on salvage, to its allies; but if instances can be given of British property retaken by them and condemned as prize, the Court of Admiralty will determine their cases according to their own rule" (*o*).

§ 370. American law adopts the rule of reciprocity as to restitution of the property of friendly nations, recaptured from an enemy.

The law of our own country proceeds on the same principle of reciprocity, as to the restitution of vessels or goods belonging to friendly foreign nations, and recaptured from the enemy by our ships of war. By the act of Congress of the 3rd March, 1800, ch. xiv. § 3, it is provided that the vessels or goods of persons permanently resident within the territory and under the protection of any foreign government in amity with the United States, and retaken by their vessels, shall be restored to the owner, he paying, for salvage, such portion of the value thereof, as by the law and usage of such foreign governments shall be required of any vessel or goods of the

(*o*) Sir W. Scott, in *The Santa Cruz*, 1 C. Rob. pp. 58—63.

United States under like circumstances of recapture; and where no such law or usage shall be known, the same salvage shall be allowed as is provided in the case of the recapture of the property of persons resident within, or under the protection of the United States. Provided that no such vessel or goods shall be restored to such former owner, in any case where the same shall have been condemned as prize by competent authority, before the recapture; nor in any case, where by the law and usage of such foreign government, the vessels or goods of citizens of the United States would not be restored in like circumstances.

§ 371. Laws of different countries as to recaptures.

It becomes then material to ascertain what is the law of different maritime nations on the subject of recaptures; and this must be sought for either in the prize code and judicial decisions of each country, or in the treaties by which they are bound to each other.

§ 372. British law.

The present British law of military salvage was established by the statutes of the 43rd Geo. III., ch. 160, and the 45th Geo. III., ch. 72, which provide that any vessel or goods therein, belonging to British subjects, and taken by the enemy as prize, which shall be retaken, shall be restored to the former owners, upon payment for salvage of one-eighth part of the value thereof, if retaken by his Majesty's ships; and if retaken by any privateer, or other ship or vessel under his Majesty's protection, of one sixth part of such value. And if the same shall have been retaken by the joint operation of his Majesty's ships and privateers, then the proper court shall order such salvage to be paid as shall be deemed fit and reasonable. But if the vessel so retaken shall appear to have been set forth by the enemy as a ship of war, then the same shall not be restored to the former owners, but shall be adjudged lawful prize for the benefit of the captors (*p*).

§ 373 American law.

The act of Congress of the 3rd March, 1800, ch. xiv. §§ 1, 2, provides that, in case of recaptures of vessels or goods belonging to persons resident within, or under the protection of the United States, *the same not having been condemned as prize by competent authority*, before the recapture, shall be

(*p*) [These Acts are now repealed (27 & 28 Vict. c. 23), and the Naval Prize Act, 1864 (27 & 28 Vict. c. 25) re-enacts their provisions with some modifications. See also *The Progress*, Edw. Ad. 210, as to the valuation of a prize.]

restored on payment of salvage of one-eighth of the value if recaptured by a public ship; and if the recaptured vessel shall appear to have been set forth and armed as a vessel of war before such capture, or afterwards, and before the recapture, then the salvage to be one moiety of the value. If the recaptured vessel previously belonged to the Government of the United States and be *unarmed*, the salvage is one-sixth, if recaptured by a private vessel, and one-twelfth, if recaptured by a public ship; if *armed*, then the salvage to be one moiety if recaptured by a private vessel, and one-fourth if recaptured by a public ship. In respect to public armed ships, the cargo pays the same rate of salvage as the vessel, by the express words of the act; but in respect to private vessels, the rate of salvage (probably by some unintentional omission in the act) is the same on the cargo, whether the vessel be armed or unarmed (*q*).

It will be perceived, that there is a material difference between the American and British laws on this subject; the Act of Parliament continuing the *jus postliminii* for ever between the original owners and recaptors, even if there has been a previous sentence of condemnation, unless the vessel retaken appears to have been set forth by the enemy as a ship of war; whilst the act of Congress continues the *jus postliminii* until the property is divested by a sentence of condemnation in a competent court, and no longer; which was also the maritime law of England, until the statute stepped in, and, *as to British subjects*, revived the *jus postliminii* of the original owner.

§ 374. French law.

By the more recent French law on the subject of recaptures, if a French vessel be retaken from the enemy after being in his hands more than twenty-four hours, it is good prize to the recaptor; but if retaken before twenty-four hours have elapsed, it is restored to the owner, with the cargo, upon the payment of one-third the value for salvage, in case of recapture by a privateer, and one-thirtieth in case of recapture by a public ship. But in case of recapture by a public ship, after twenty-four hours' possession, the vessel and cargo are restored on a salvage of one-tenth.

Although the letter of the ordinances, previous to the revo-

(*q*) *The Adeline*, 9 Cranch, 244. [See U. S. Revised Statutes, tit. Prize.]

lution, condemned as good prize, French property recaptured after being twenty-four hours in possession of the enemy, whether the same be retaken by public or private armed vessels; yet it seems to have been the constant practice in France to restore such property when recaptured by the king's ships (*r*). The reservation contained in the ordinance of the 15th of June, 1779, by which property recaptured after twenty-four hours' possession by the enemy, was condemned to the crown, which reserved to itself the right of granting to the recaptors such reward as it thought fit, made the salvage discretionary in every case, it being regulated by the king in council according to circumstances (*s*).

France applies her own rule to the recapture of the property of her allies. Thus, the Council of Prizes decided on the 9th February, 1801, as to two Spanish vessels recaptured by a French privateer after the twenty-four hours had elapsed, that they should be condemned as good prize by the recaptor. Had the recapture been made by a public ship, whether before or after twenty-four hours' possession by the enemy, the property would have been restored to the original owner, according to the usage with respect to French subjects, and on account of the intimate relation subsisting between the two powers (*t*).

The French law also restores, on payment of salvage, even after twenty-four hours' possession by the enemy, in cases where the enemy leaves the prize a derelict, or where it reverts to the original proprietor in consequence of the perils of the seas, without a military recapture. Thus the Marine Ordinance of Louis XIV., of 1681, liv. iii. tit. 9, art. 9, provides that, "if the vessel, without being recaptured, is abandoned by the enemy, or if in consequence of storms or other accident, it comes into the possession of our subjects, before it has been carried into an enemy's port (avant qu'il ait été conduit dans aucun port ennemi); it shall be restored to the proprietor, who may claim the same within a year and

(*r*) Valin, sur l'Ord. liv. iii. tit. 9, art. 3. Traité des Prises, ch. 6, § 1, No. 8, § 88. Pothier, Traité de Propriété, No. 97. Emérigon, des Assurances, tom i. p. 497.

(*s*) Emérigon, des Assurances, tom i. p. 497.

(*t*) Pothier, de Propriété, No. 100. Emérigon, tom. i. p. 499. Azuni, Droit Maritime de l'Europe, Partie ii. ch. 4, § 11.

a day, although it has been more than twenty-four hours in the possession of the enemy." Pothier is of opinion that the above words, *avant qu'il ait été conduit dans aucun port ennemi*, are to be understood, not as restricting the right of restitution to the particular case mentioned of a vessel abandoned by the enemy before being carried into port, which case is mentioned merely as an example of what ordinarily happens, "parceque c'est le cas ordinaire auquel un vaisseau échappé à l'ennemi qui l'a pris, ne pouvant pas guères lui échapper lorsqu'il a été conduit dans ses ports" (*u*). But Valin holds, that the terms of the ordinance are to be literally construed, and that the right of the original proprietor is completely divested by the carrying into an enemy's port. He is also of opinion that this species of salvage is to be likened to the case of shipwreck, and that the recaptors are entitled to one-third of the value of the property saved (*x*). Azuni contends that the rule of salvage in this case is not regulated by the ordinance, but is discretionary, to be proportioned to the nature and extent of the service performed, which can never be equal to the rescue of property from the hands of the enemy by military force, or to the recovery of goods lost by shipwreck (*y*). Emérigon is also opposed to Valin on this question (*z*).

§ 375. Spanish law.

Spain formerly adopted the law of France as to recaptures, having borrowed its prize code from that country ever since the accession of the house of Bourbon to the Spanish throne. In the case of *The San Jago* (mentioned in that of *The Santa Cruz*, before cited), the Spanish law was applied, upon the principle of reciprocity, as the rule of British recapture of Spanish property. But by the subsequent Spanish prize ordinance of the 20th of June, 1801, art. 38, it was modified as to the property of friendly nations; it being provided that when the recaptured ship is not laden for enemy's account, it shall be restored, if recaptured by public vessels, for one-eighth, if by privateers for one-sixth salvage: provided that the nation to which such property belongs has

(*u*) Pothier, de Propriété, No. 99.
(*x*) Valin, sur l'Ord. in loco.
(*y*) Azuni, Droit Maritime, Partie ii. ch. 4, §§ 8, 9.
(*z*) Emérigon, des Assurances, tom. i. pp. 504—505. He cites in support of his opinion the Consolato del Mare, cap. 287, and Targa, cap. 46, No. 10.

adopted, or agrees to adopt, a similar conduct towards Spain. The ancient rule is preserved as to recaptures of Spanish property; it being restored without salvage, if recaptured by a king's ship before or after twenty-four hours' possession; and if recaptured by a privateer within that time, upon payment of one-half for salvage; if recaptured after that time, it is condemned to the recaptors. The Spanish law has the same provisions with the French in cases of captured property becoming derelict, or reverting to the possession of the former owners by civil salvage.

§ 376. Portuguese law.

Portugal adopted the French and Spanish law of recaptures, in her ordinances of 1704 and 1796. But in May, 1797, after *The Santa Cruz* was taken, and before the judgment of the English High Court of Admiralty was pronounced in that case, Portugal revoked her former rule by which twenty-four hours' possession by the enemy divested the property of the former owner, and allowed restitution after that time, on salvage of one-eighth, if the capture was by a public ship, and one-fifth if by a privateer. In *The Santa Cruz* and its fellow cases, Sir W. Scott distinguished between recaptures made *before* and *since* the ordinance of May, 1797; condemning the former where the property had been twenty-four hours in the enemy's possession, and restoring the latter upon payment of the salvage established by the Portuguese ordinance.

§ 377. Dutch law.

The ancient law of Holland regulated restitution on the payment of salvage at different rates, according to the length of time the property had been in the enemy's possession (*a*).

§ 378. Danish law.

The ancient law of Denmark condemned after twenty-four hours' possession by the enemy, and restored, if the property had been a less time in the enemy's possession, upon payment of a moiety of the value as salvage. But the ordinance of the 28th March, 1810, restored Danish or allied property without regard to the length of time it might have been in the enemy's possession, upon payment of one-third the value.

§ 379. Swedish law.

By the Swedish ordinance of 1788, it is provided, that the rates of salvage on Swedish property shall be one-half the value, without regard to the length of time it may have been in the enemy's possession.

(*a*) Bynkershoek, Quæst. Jur. Pub. lib. i. cap. 5.

§ 380. What constitutes a "setting forth as a vessel of war," under the Prize Act.

What constitutes a *setting forth as a vessel of war* has been determined by the British Courts of Prize, in cases arising under the clause in the Act of Parliament, which may serve for the interpretation of our own law, as the provisions are the same in both. Thus it has been settled, that where a ship was originally armed for the slave-trade, and after capture an additional number of men were put on board, but there was no commission of war, and no additional arming, it was not a setting forth as a vessel of war under the act (*b*). But a commission of war is decisive if there be guns on board (*c*). And where the vessel, after the capture, has been fitted out as a privateer, it is conclusive against her, although when recaptured, she is navigating as a mere merchant ship; for where the former character of a captured vessel had been obliterated by her conversion into a ship of war, the legislature meant to look no further, but considered the title of the former owner for ever extinguished (*d*). Where it appeared that the vessel had been engaged in the military service of the enemy, under the direction of his minister of the marine, it was held as a sufficient proof of a setting forth as a vessel of war (*e*). So where the vessel is armed, and is employed in the public military service of the enemy by those who have competent authority so to employ it, although it be not regularly commissioned (*f*). But the mere employment in the enemy's military service is not sufficient; but if there be a fair semblance of authority in the person directing the vessel to be so employed, and nothing upon the face of the proceedings to invalidate it, the court will presume that he is duly authorized; and the commander of a single ship may be presumed to be vested with this authority as commander of a squadron (*g*).

§ 381. Recapture by a non-commissioned vessel.

It is no objection to an allowance of salvage on a recapture, that it was made by a non-commissioned vessel; it is the duty of every citizen to assist his fellow-citizens in war, and to retake their property out of the enemy's possession; and no commission is necessary to give a person so employed a title

(*b*) *The Horatio*, 6 C. Rob. 320.
(*c*) *The Ceylon*, 1 Dods. Ad. 105.
(*d*) *The Actif*, Edw. Ad. 185.
(*e*) *The Santa Brigada*, 3 C. Rob. 65.
(*f*) *The Ceylon*, 1 Dods. Ad. 105.
(*g*) *The Georgiana*, Ib., 397.

to the reward which the law allots to that meritorious act of duty (*h*). And if a convoying ship recaptures one of the convoy, which has been previously captured by the enemy, the recaptors are entitled to salvage (*i*). But a mere rescue of a ship engaged in the same common enterprise gives no right to salvage (*k*).

§ 382. Actual rescue necessary for military salvage for recapture.

To entitle a party to salvage, as upon a recapture, there must have been an actual or constructive capture; for military salvage will not be allowed in any case where the property has not been actually rescued from the enemy (*l*). But it is not necessary that the enemy should have actual possession; it is sufficient if the property is completely under the dominion of the enemy (*m*). If, however, a vessel be captured going in distress into an enemy's port, and is thereby saved, it is merely a case of *civil* and not of *military* salvage (*n*). But to constitute a recapture, it is not necessary that the recaptors should have a bodily and actual possession; it is sufficient if the prize be actually rescued from the grasp of the hostile captor (*o*). Where a hostile ship is captured, and afterwards recaptured by the enemy, and again recaptured from the enemy, the original captors are not entitled to restitution on paying salvage, but the last captors are entitled to the whole rights of prize; for, by the first recapture, the right of the original captors is entirely divested (*p*). Where the original captors have abandoned their prize, and it is subsequently captured by other parties, the latter are solely entitled to the property (*q*). But if the abandonment be involuntary, and produced by the terror of superior force, and especially if produced by the act of the second captors, the rights of the original captors are completely revived (*r*). And where the enemy has captured a ship, and afterwards deserted the cap-

(*h*) *The Helen*, 3 C. Rob. 224.
(*i*) *The Wight*, 6 Ib. 315.
(*k*) *The Belle*, Edw. Ad. 66.
(*l*) *The Franklin*, 4 C. Rob. 147.
(*m*) *The Edward and Mary*, 3 Ib. 305; *The Pensamento Felix*, Edw. Ad. 116.
(*n*) *The Franklin*, 4 C. Rob. 147.
(*o*) *The Edward and Mary*, 3 Ib. 305.
(*p*) 4 C. Rob. 217, Note *a*. *The Astrea*, 1 Wheaton, 125. Valin, sur l'Ord. tom. ii. pp. 257—259. Traité des Prises, ch. 6, § 1. Pothier, de Propriété, No. 99.
(*q*) *The Lord Nelson*, Edw. Ad. 79. *The Diligentia*, 1 Dods. Ad. 404.
(*r*) *The Mary*, 2 Wheaton, 123.

tured vessel, and it is then recaptured, this is not to be considered as a case of derelict; for the original owner never had the *animus delinquendi*, and therefore it is to be restored on payment of salvage; but as it is not strictly a recapture within the prize act, the rate of salvage is discretionary (*s*). But if the abandonment by the enemy be produced by the terror of hostile force, it is a recapture within the terms of the act (*t*). Where the captors abandon their prize, and it is afterwards brought into port by neutral salvors, it has been held that the neutral Court of Admiralty has jurisdiction to decree salvage, but cannot restore the property to the original belligerent owners; for by the capture, the captors acquired such a right of property as no neutral nation can justly impugn or destroy, and, consequently, the proceeds, (after deducting salvage,) belong to the original captors; and neutral nations ought not to inquire into the validity of a capture between belligerents (*u*). But if the captors make a donation of the captured vessel to a neutral crew, the latter are entitled to a remuneration as salvors; but after deducting salvage, the remaining proceeds will be decreed to the original owner (*x*). And it seems to be a general rule, liable to but few exceptions, that the rights of capture are completely divested by a hostile recapture, escape, or voluntary discharge of the captured vessel (*y*). And the same principle seems applicable to a *hostile* rescue, but if the rescue be made by the *neutral* crew of a neutral ship, it may be doubtful how far such an illegal act, which involves the penalty of confiscation, would be held, in the prize courts of the captor's country, to divest his original right in case of a subsequent recapture.

§ 382a. Case of *The Emily St. Pierre.*

An interesting illustration of the law respecting the rescue of a captured neutral ship by part of her own crew occurred during the American civil war. *The Emily St. Pierre*, a British ship, was on a voyage from Calcutta with orders to make the coast of South Carolina, and ascertain whether it was still under blockade. If so, she was to go to New Brunswick; if not, she was to enter Charlestown harbour. She had no contraband on board. While heading for Charlestown, and

(*s*) *The John and Jane*, 4 C. Rob. 216.
(*t*) *The Gage*, 6 Ib. 273.
(*u*) *The Mary Ford*, 3 Dallas, 188.
(*x*) *The Adventure*, 8 Cranch, 227.
(*y*) *Hudson* v. *Guestier*, 4 Cranch, 293; S. C. 6 Ib. 281; *The Diligentia*, 1 Dods. Ad. 404.

about ten or twelve miles from shore, she was seized by one of the blockading cruisers, on the 18th March, 1862. Her crew were taken out, except the master, cook, and steward, who were kept on board to give evidence before a Prize Court. Two officers and thirteen men were put on board, and ordered to take her to Philadelphia. On their way thither, the three prisoners rose against their captors, disarmed and secured them, and, with the assistance of three or four of the prize crew, who volunteered to lend a hand rather than remain confined, but who were all landsmen, managed to take her to Liverpool. Mr. Adams demanded the restitution of this vessel, and cited the cases of *The Catherine Elizabeth* (*z*) and *The Despatch* (*a*), as evidence of Lord Stowell's condemnation of such a proceeding. Lord Russell, however, declined to seize the ship and give her up to the United States, on the ground that Her Majesty's government had no jurisdiction or legal power to take or to acquire possession of her, or to interfere with her owners in relation to their property in her (*b*). "Acts of forcible resistance," said his Lordship, "to the rights of belligerents, when lawfully exercised over neutral merchant ships on the high seas, such, for instance, as rescue from capture, however cognisable or punishable as offences against international law, in the Prize Courts of the captor administering such law, are not cognisable by the municipal law of England, and cannot by that law be punished either by confiscation of the ship, or by any other penalty; and Her Majesty's government cannot raise in an English court the question of the validity of the capture of *The Emily St. Pierre*, or of the subsequent rescue and recapture of that vessel, for such recapture is not an offence against the municipal law of this country" (*c*). The discussion ended by its being discovered that in 1800, England had asked the United States to do precisely the same thing, and that the American government had refused to comply on the very grounds put forward by Lord Russell (*d*). It may therefore be taken as a settled point, that if a neutral vessel is captured by a belligerent cruiser, and before condemnation she manages to escape and reach her own country, the neutral government is not bound to surrender her to that of the captor.

§ 383 Salvage on second recapture.

As to recaptors, although their right to salvage is extinguished by a subsequent hostile recapture and regular sentence of condemnation, divesting the original owners of their property, yet if the vessel be restored upon such recapture, and resume her voyage, either in consequence of a judicial acquittal, or a release by the sovereign power, the recaptors are redintegrated in their right of salvage (*e*). And recaptors

(*z*) [5 C. Rob. 232.]
(*a*) [3 C. Rob. 278.]
(*b*) [Earl Russell to Mr. Adams, 7th May, 1862. U. S. Dipl. Cor. 1862, p. 87.]
(*c*) [Ibid.]
(*d*) [U. S. Dipl. Cor. 1862, p. 113.]
(*e*) *The Charlotte Caroline*, 1 Dods. Ad. 192.

and salvors have a legal interest in the property, which cannot be divested by other subjects, without an adjudication in a competent court; and it is not for the government's ships or officers, or for other persons, upon the ground of superior authority, to dispossess them without cause (*f*).

§ 384 Rate of salvage.

In all cases of salvage where the rate is not ascertained by positive law, it is in the discretion of the Court, as well upon recaptures as in other cases (*g*). And where, upon a recapture, the parties have entitled themselves to a *military* salvage, under the Prize Act, the Court may also award them, in addition, a civil salvage, if they have subsequently rendered extraordinary services in rescuing the vessel in distress from the perils of the seas (*h*).

§ 384a. Joint capture of prize.

All parties who have been instrumental in capturing property are entitled to share in the proceeds as joint captors. In naval warfare there is a distinction between the rights of privateers and those of public ships with regard to joint capture. A public ship, when in sight at the time the prize is taken, is considered as constructively assisting, and therefore entitled to share in the capture, while a privateer under similar circumstances is not regarded as a joint captor, unless she directly contributes to the seizure (*i*). This is founded upon the fact that privateers, being fitted out for private gain, are not bound to put their commissions in use on every discovery of the enemy, whereas public ships, being under a constant obligation to attack when the enemy comes in sight, are presumed to be there *animo capiendi* (*k*). As a rule, when ships are associated in the same enterprize and under the same superior officer, all are entitled to share as joint captors, it being then only necessary to prove what ships actually formed part of the fleet at the time of capture (*l*). If, however, a part of the fleet is detached on a separate service, or if the detached vessels are out of the scene of the common operations for the time, the prize then belongs to the actual captors alone (*m*). During the Crimean war, France and England agreed, (1), that a joint capture made by the naval forces of both countries should be adjudicated on in the country of the highest naval officer concerned in the capture, and, (2),

(*f*) *The Blendenhale*, 1 Dods. Ad. 414.

(*g*) *Talbot* v. *Seeman*, 1 Cranch, 1; 3 C. Rob. 308; Bynkershoek, Quæst. Jur. Pub. lib. i. cap. 5.

(*h*) *The Louisa*, 1 Dods. Ad. 317. [*Jecker* v. *Montgomery*, 13 Howard, 515.]

(*i*) [Phillimore, vol. iii. § 388. *The Dordrecht*, 2 C. Rob. 55. *Talbot* v. *Three Briggs*, 1 Dallas, 103. *The Forsigheid*, 3 C. Rob. 311.]

(*k*) [Halleck, ch. xxx. § 7. *The Santa Brigada*, 3 C. Rob. 52.]

(*l*) [*The Guillaume Tell*, Edw. Ad. 6. Halleck, ch. xxx. § 11. Phillimore, vol. iii. § 398. *The Forsigheid*, 3 C. Rob. 311.]

(*m*) [Phillimore, vol. iii. § 398. *The Forsigheid*, 3 C. Rob. 311. Ships of war are entitled to share in all captures made by their tenders. *The Carl*, 2 Spinks, 261.]

that in the case of a capture made by the cruiser of one nation, in sight of a cruiser of the other, such cruiser having thus contributed to the intimidation of the enemy, the adjudication thereof should belong to the jurisdiction of the actual captor (*n*).

§ 384b. Joint capture of booty.

The rights of joint captors on land are not the same as those of naval captors. Joint captors are those who have assisted, or are taken to have assisted, the actual captors by conveying encouragement to them, or intimidation to the enemy. On land the union of the joint captor with the actual captor under the command of the same officer, alone constitutes the bond of association which the law recognizes as a title to joint sharing. Community of enterprize does not constitute association, and is equally insufficient as a ground for joint sharing, if the bond of union, though originally well constituted, has ceased to be in force at the time of the capture. The distinctions between captures on land and captures at sea tend to show that in considering joint capture of booty, a wider application than is recognized in prize cases must be allowed to the term "co-operation," concerted action on a vaster scale than is feasible at sea being indispensable to a campaign. The rule of sight, too, which prevails at sea is inapplicable on land. The general rule for the distribution of booty, to be adhered to as far as possible, in accordance with naval prize decisions, is the rule of actual capture. The association entitling to joint sharing must be military, and not political, and must be under the immediate command of the same commander. The co-operation which is necessary as a title to joint sharing, is a co-operation tending directly to produce the capture in question (*o*).

§ 385. Validity of maritime captures determined in the courts of the captor's country.

The validity of maritime captures must be determined in a Court of the captor's government, sitting either in his own country or in that of its ally. This rule of jurisdiction applies, whether the captured property be carried into a port of the captor's country, into that of an ally, or into a neutral port.

§ 386. Condemnation of property lying in the ports of an ally.

Respecting the *first* case, there can be no doubt. In the *second* case, where the property is carried into the port of an ally, there is nothing to prevent the government of the country, although it cannot itself condemn, from permitting the exercise of that final act of hostility, the condemnation of the property of one belligerent to the other; there is a common interest between the two governments, and both may be presumed to authorize any measures conducing to give effect to their arms, and to consider each other's ports as mutually subservient. Such an adjudication is therefore sufficient, in

(*n*) [Convention of 20th May, 1854. As to the proceedings of joint captors in the Admiralty Court, see the Naval Prize Act, 1864, Appendix D.]

(*o*) [*The Banda and Kirwee Booty*, L. R. 1 A. & E. 109, where the law respecting capture of property by land and sea is fully discussed. See also Report of Commissioners to inquire into the distribution of Army Prize, 1864.]

regard to property taken in the course of the operations of a common war.

§ 387. Property carried into a neutral port.

But where the property is carried into a *neutral* port, it may appear, on principle, more doubtful whether the validity of a capture can be determined even by a Court of Prize established in the captor's country; and the reasoning of Sir W. Scott, in the case of *The Henrick and Maria*, is certainly very cogent, as tending to show the irregularity of the practice; but he considered that the English Court of Admiralty had gone too far in its own practice of condemning captured vessels lying in neutral ports, to recall it to the proper purity of the original principle. In delivering the judgment of the Court of Appeals in the same case, Sir William Grant also held that Great Britain was concluded, by her own inveterate practice, and that neutral merchants were sufficiently warranted in purchasing under such a sentence of condemnation, by the constant adjudications of the British tribunals. The same rule has been adopted by the Supreme Court of the United States, as being justifiable on principles of convenience to belligerents as well as neutrals; and though the prize was in fact within a neutral jurisdiction, it was still to be considered as under the control of the captor, whose possession is considered as that of his sovereign (*p*).

§ 388. Jurisdiction of the courts of the captor, how far exclusive.

This jurisdiction of the national courts of the captor, to determine the validity of captures made in war under the authority of his government, is exclusive of the judicial authority of every other country, with two exceptions only:—1. Where the capture is made within the territorial limits of a neutral State. 2. Where it is made by armed vessels fitted out within the neutral territory (*q*).

In either of these cases, the judicial tribunals of the neutral State have jurisdiction to determine the validity of the captures thus made, and to vindicate its neutrality by restoring the property of its own subjects, or of other States in amity with it, to the original owners. These exceptions to the exclusive jurisdiction of the national courts of the captor,

(*p*) 4 C. Rob. 43, and 6 Ib. 138, note (*a*). Bynkershoek, Quæst. Jur. Pub. lib. i. cap. 5. Duponceau's Transl. Note, p. 38. Kent's Commentaries on American Law, vol. i. p. 103. Wheaton's Hist. Law of Nations, p. 321. [*The Polka*, 1 Spinks, 447.]

(*q*) *The Estrella*, 4 Wheaton, 298. *The Santissima Trinidad*, 7 Ib. 283.

have been extended by the municipal regulations of some countries to the restitution of the property of their own subjects, in all cases where the same has been unlawfully captured, and afterwards brought into their ports; thus assuming to the neutral tribunal the jurisdiction of the question of prize or no prize, wherever the captured property is brought within the neutral territory. Such a regulation is contained in the marine ordinance of Louis XIV., of 1681, and its justice is vindicated by Valin, upon the ground that this is done by way of compensation for the privilege of asylum granted to the captor and his prizes in the neutral port. There can be no doubt that such a condition may be expressly annexed by the neutral State to the privilege of bringing belligerent prizes into its ports, which it may grant or refuse at its pleasure, provided it be done impartially to all the belligerent powers; but such a condition is not implied in a mere general permission to enter the neutral ports. The captor, who avails himself of such a permission, does not thereby lose the military possession of the captured property, which gives to the Prize Courts of his own country exclusive jurisdiction to determine the lawfulness of the capture. This jurisdiction may be exercised either whilst the captured property is lying in the neutral port, or the prize may be carried thence *infra præsidia* of the captor's country where the tribunal is sitting. In either case, the claim of any neutral proprietor, even a subject of the State into whose ports the captured vessel or goods may have been carried, must, in general, be asserted in the Prize Court of the belligerent country, which alone has jurisdiction of the question of prize or no prize (*r*).

§ 389. Condemnation by consular tribunal sitting in the neutral country.

This jurisdiction cannot be exercised by a delegated authority in the neutral country, such as a consular tribunal sitting in the neutral port, and acting in pursuance of instructions from the captor's State. Such a judicial authority, in the matter of prize of war, cannot be conceded by the neutral State to the agents of a belligerent power within its own territory, where even the neutral government itself has no

(*r*) Valin, Comment. sur l'Ordon. de la Marine, liv. iii. tit 9. Des Prises, art. 15, tom. ii. p. 274. Lampredi, Trattato del Commercio de Popoli Neutrali in Tempo de Guerra, p. 228.

right to exercise such a jurisdiction, except in cases where its own neutral jurisdiction and sovereignty have been violated by the capture. A sentence of condemnation, pronounced by a belligerent consul in a neutral port, is, therefore, considered as insufficient to transfer the property in vessels or goods captured as prize of war, and carried into such port for adjudication (*s*).

§ 390. Responsibility of the captor's government for the acts of its commissioned cruisers and courts.

The jurisdiction of the Court of the capturing nation is conclusive upon the question of property in the captured thing. Its sentence forecloses all controversy respecting the validity of the capture, as between claimant and captors, and those claiming under them, and terminates all ordinary judicial inquiry upon the subject-matter. But where the responsibility of the captors ceases, that of the State begins. It is responsible to other States for the acts of the captors under its commission, the moment these acts are confirmed by the definitive sentence of the tribunals which it has appointed to determine the validity of captures in war.

§ 391. Unjust sentence of a foreign court, ground of reprisals.

Grotius states that a judicial sentence, plainly against right (*in re minimè dubiâ*), to the prejudice of a foreigner, entitles his nation to obtain reparation by reprisals:—"For the authority of the judge (says he) is not of the same force against strangers as against subjects. Here is the difference: subjects are bound up and concluded by the sentence of the judge, though it be unjust, so that they cannot lawfully oppose its execution, nor by force recover their own right, on account of the controlling efficacy of that authority under which they live. But strangers have coercive power (that is, of reprisals, of which the author is treating,) though it be not lawful to use it so long as they can obtain their right in the ordinary course of justice" (*t*).

So, also, Bynkershoek, in treating the same subject, puts an unjust judgment upon the same footing with naked

(*s*) *The Flad Oyen*, 1 C. Rob. 135.

(*t*) "Quod fieri intelligitur non tantum si in sontem aut debitorem judicium intra tempus idoneum obtineri nequeat, verum etiam si in re minimè dubiâ (nam in dubiâ re præsumptio est pro his qui ad judicia publicè electi sunt) plane contra jus judicatum sit. Nam auctoritas judicantis non idem in exteros quod in subditos valet. . . . . Hoc interest, quod subditi exsecutionem etiam injustæ sententiæ vi impedire, aut contra eam jus suum vi exsequi licitè non possunt, ob imperii in ipsos efficaciam: exteri autem jus habent cogendi, sed quo uti non liceat quàmdiu per judicium, suum possint obtinere." Grotius, de Jur. Bel. ac Pac. lib. iii. cap. 2, § 5, No. 1.

violence, in authorizing reprisals on the part of the State whose subjects have been thus injured by the tribunals of another State. And Vattel, in enumerating the different modes in which justice may be refused, so as to authorize reprisals, mentions "a judgment manifestly unjust and partial;" and though he states what is undeniable, that the judgments of the ordinary tribunals ought not to be called in question upon frivolous or doubtful grounds, yet he is manifestly far from attributing to them that sanctity which would absolutely preclude foreigners from seeking redress against them (*u*).

These principles are sanctioned by the authority of numerous treaties between the different powers of Europe regulating the subject of reprisals, and declaring that they shall not be granted unless in case of *the denial of justice.* An unjust sentence must certainly be considered a denial of justice, unless the mere privilege of being heard before condemnation is all that is included in the idea of justice.

§ 392. Distinction between municipal tribunals and Courts of Prize.

Even supposing that unjust judgments of municipal tribunals do not form a ground of reprisals, there is evidently a wide distinction in this respect between the ordinary tribunals of the State, proceeding under the municipal law as their rule of decision, and prize tribunals, appointed by its authority, and professing to administer the law of nations to foreigners as well as subjects. The ordinary municipal tribunals acquire jurisdiction over the person or property of a foreigner by his consent, either *expressed* by his voluntarily bringing the suit, or *implied* by the fact of his bringing his person or property within the territory. But when Courts of Prize exercise their jurisdiction over vessels captured at sea, the property of foreigners is brought by force within the territory of the State by which those tribunals are constituted. By natural law, the tribunals of the captor's country are no more the rightful exclusive judges of captures in war, made on the high seas from under the neutral flag, than are the tribunals of the neutral country. The equality of nations would, on principle, seem to forbid the exercise of a jurisdiction thus acquired by force and violence, and

(*u*) Bynkershoek, Quæst. Jur. Pub. lib. i. cap. 24. Vattel, Droit des Gens, liv. ii. ch. 18, § 350.

administered by tribunals which cannot be impartial between the litigating parties, because created by the sovereign of the one to judge the other. Such, however, is the actual constitution of the tribunals, in which, by the positive international law, is vested the exclusive jurisdiction of prizes taken in war. But the imperfection of the voluntary law of nations, in its present state, cannot oppose an effectual bar to the claim of a neutral government seeking indemnity for its subjects who have been unjustly deprived of their property, under the erroneous administration of that law. The institution of these tribunals, so far from exempting, or being intended to exempt, the sovereign of the belligerent nation from responsibility for the acts of his commissioned cruisers, is designed to ascertain and fix that responsibility. Those cruisers are responsible only to the sovereign whose commissions they bear. So long as seizures are regularly made upon apparent grounds of just suspicion, and followed by prompt adjudication in the usual mode, and until the acts of the captors are confirmed by the sovereign in the sentences of the tribunals appointed by him to adjudicate in matters of prize, the neutral has no ground of complaint, and what he suffers is the inevitable result of the belligerent right of capture. But the moment the decision of the tribunal of the last resort has been pronounced, (supposing it not to be warranted by the facts of the case, and by the law of nations applied to those facts,) and justice has been thus finally denied, the capture and the condemnation become the acts of the State, for which the sovereign is responsible to the government of the claimant. There is nothing more irregular in maintaining that the sovereign is responsible towards foreign States for the acts of his tribunals, than in maintaining that he is responsible for his own acts, which, in the intercourse of nations, are constantly made the ground of complaint, of reprisals, and even of war. No greater sanctity can be imputed to the proceedings of prize tribunals, even by the most extravagant theory of the conclusiveness of their sentences, than is justly attributed to the acts of the sovereign himself. But those acts, however binding upon his own subjects, if they are not conformable to the public law of the world, cannot be considered as binding upon the

subjects of other States. A wrong done to them forms an equally just subject of complaint on the part of their government, whether it proceeds from the direct agency of the sovereign himself, or is inflicted by the instrumentality of his tribunals. The tribunals of a State are but a part, and only a subordinate part, of the government of that State. But the right of redress against injurious acts of the whole government, of the supreme authority, incontestably exists in foreign States, whose subjects have suffered by those acts. Much more clearly then must it exist, when those acts proceed from persons, authorities, or tribunals, responsible to their own sovereign, but irresponsible to a foreign government, otherwise than by its action on their sovereign.

These principles, so reasonable in themselves, are also supported by the authority of the writers on public law, and by historical examples.

§ 393. Opinion of Rutherforth.

"The exclusive right of the State, to which the captors belong, to adjudicate upon the captures made by them," says Rutherforth, "is founded upon another; that is, its right to inspect into the conduct of the captors, both because they are members of it, and because it is responsible to all other States for what they do in war; since what they do in war is done either under its general or its special commission. The captors are therefore obliged, on account of the jurisdiction which the State has over their persons, to bring such ships or goods as they seize in the main ocean into their own ports, and they cannot acquire property in them until the State has determined whether they were lawfully taken or not. The right which their own State has to determine this matter is so far an exclusive one, that no other State can claim to judge of their conduct until it has been thoroughly examined into by their own; both because no other State has jurisdiction over their persons, and likewise because no other State is answerable for what they do. But the State to which the captors belong, whilst it is thus examining into the conduct of its own members, and deciding whether the ships or goods which they have seized are lawfully taken or not, is determining a question between its own members and the foreigners who claim the property; and this controversy did not arise within its own territory, but in the main ocean.

The right, therefore, which it exercises is not civil jurisdiction; and the civil law, which is peculiar to its own territory, is not the law by which it ought to proceed. Neither the place where the controversy arose, nor the parties who are concerned in it, are subject to this law. The only law by which this controversy can be determined, is the law of nature, applied to the collective bodies of civil societies, that is, the law of nations; unless, indeed, there have been any particular treaties made between the two States, to which the captors and the other claimants belong, mutually binding them to depart from such rights as the law of nations would otherwise have supported. Where such treaties have been made, they are a law to the two States, as far as they extend, and to all the members of them, in their intercourse with one another. The State, therefore, to which the captors belong, in determining what might or might not be lawfully taken, is to judge by these particular treaties, and by the law of nations taken together. This right of the State, to which the captors belong, to judge exclusively, is not a complete jurisdiction. The captors, who are its own members, are bound to submit to its sentence, though this sentence should happen to be erroneous, because it has a complete jurisdiction over their persons. But the other parties to the controversy, as they are members of another State, are only bound to submit to its sentence so far as this sentence is agreeable to the law of nations, or to particular treaties; because it has no jurisdiction over them, either in respect of their persons, or of the things that are the subject of the controversy. If justice, therefore, is not done to them, they may apply to their own State for a remedy; which may, consistently with the law of nations, give them a remedy, either by solemn war or reprisals. In order to determine when their right to apply to their own State begins, we must inquire when the exclusive right of the other State to judge in this controversy ends. As this exclusive right is nothing else but the right of the State, to which the captors belong, to examine into the conduct of its own members before it becomes answerable for what they have done, such exclusive right cannot end until their conduct has been thoroughly examined. Natural equity will not allow that the State should be answerable for their acts, until those

acts are examined by all the ways which the State has appointed for this purpose. Since, therefore, it is usual in maritime countries to establish not only inferior courts of marine, to judge what is and what is not lawful prize, but likewise superior courts of review, to which the parties may appeal, if they think themselves aggrieved by the inferior courts; the subjects of a neutral State can have no right to apply to their own State for a remedy against an erroneous sentence of an inferior court, till they have appealed to the superior court, or to the several superior courts, if there are more courts of this sort than one, and till the sentence has been confirmed in all of them. For these courts are so many means appointed by the State, to which the captors belong, to examine into their conduct; and, till their conduct has been examined by all these means, the State's exclusive right of judging continues. After the sentence of the inferior court has been thus confirmed, the foreign claimants may apply to their own State for a remedy, if they think themselves aggrieved; but the law of nations will not entitle them to a remedy, unless they have been actually aggrieved. When the matter is carried thus far, the two States become the parties in the controversy. And since the law of nature, whether it is applied to individuals or civil societies, abhors the use of force till force becomes necessary, the supreme rulers of the neutral State, before they proceed to solemn war or to reprisals, ought to apply to the supreme rulers of the other State, both to satisfy themselves that they have been rightly informed, and likewise to try whether the controversy cannot be adjusted by more gentle methods" (*x*).

§ 394. Report on the Silesian Loan causes.

In the celebrated report made to the British Government, in 1753, upon the case of the reprisals granted by the King of Prussia, on account of captures made by the cruisers of Great Britain of the property of his subjects, the exclusive jurisdiction of the captor's country over captures made in war, by its commissioned cruisers, is asserted; and it is laid down that "the law of nations, founded upon justice, equity, convenience, and the reason of the thing, does not allow of reprisals, except in case of violent injuries, directed or supported by the State, and justice absolutely denied *in re minimè dubiâ*,

(*x*) Rutherforth's Inst. vol. ii. b. ii. ch. 9, § 19.

by all the tribunals, and afterwards by the prince;" plainly showing that, in the opinion of the eminent persons by whom that paper was drawn up, if justice be denied in a clear case, by all the tribunals, and afterwards by the prince, it forms a lawful ground of reprisals against the nation by whose commissioned cruisers and tribunals the injury is committed. And that Vattel was of the same opinion, is evident from the manner in which he quotes this paper to support his own doctrine, that the sentences of the tribunals ought not to be made the ground of complaint by the State against whose subjects they are pronounced, "*excepting* the case of a refusal of justice, palpable and evident injustice, a manifest violation of rules and forms," &c. (*y*).

In the case above referred to, the King of Prussia (then neutral) had undertaken to set up within his own dominions a commission to re-examine the sentences pronounced against his subjects in the British prize courts; a conduct which is treated by the authors of the report to the British Government as an innovation, "which was never attempted in any country of the world before. Prize or no prize must be determined by courts of admiralty belonging to the power whose subjects made the capture." But the report proceeds to state, that "every foreign prince in amity has a right to demand that justice should be done to his subjects in these courts, according to the law of nations, or particular treaties, where they are subsisting. If *in re minimè dubiâ*, these courts proceed upon foundations directly opposite to the law of nations, or subsisting treaties, the neutral State has a right to complain of such determination."

The King of Prussia did complain of the determinations of the British tribunals, and made reprisals by stopping the interest upon a loan due to British subjects, and secured by hypothecation upon the revenues of Silesia, until he actually obtained from the British Government an indemnity for the Prussian vessels unjustly captured and condemned. The proceedings of the British tribunals, though they were asserted by the British government to be the only legitimate mode of determining the validity of captures made in war, were not

(*y*) Vattel, Droit des Gens, liv. ii. ch. 7, § 84.

considered as excluding the demand of Prussia for redress upon the government itself (*z*).

§ 395. Mixed commission under treaty of 1794.

So, also, under the treaty of 1794, between the United States and Great Britain, a mixed commission was appointed to determine the claim of American citizens, arising from the capture of their property by British cruisers, during the existing war with France, according to justice, equity, and the law of nations. In the course of the proceedings of this board, objections were made, on the part of the British government, against the commissioners proceeding to hear and determine any case where the sentence of condemnation had been affirmed by the Lords of Appeal in Prize Causes, upon the ground that full and entire credit was to be given to their final sentence; inasmuch as, according to the general law of nations, it was to be presumed that justice had been administered by this, the competent and supreme tribunal in matters of prize. But this objection was overruled by the board, upon the grounds and principles already stated, and a full and satisfactory indemnity was awarded in many cases where there had been a final sentence of condemnation.

§ 396. Conclusiveness of prize decisions.

Many other instances might be mentioned of arrangements between States, by which mixed commissions have been appointed to hear and determine the claims of the subjects of neutral powers, arising out of captures in war, not for the purpose of revising the sentences of the competent courts of prize, as between the captors and captured, but for the purpose of providing an adequate indemnity between State and State, in cases where satisfactory compensation had not been received in the ordinary course of justice. Although the theory of public law treats prize tribunals, established by and sitting in the belligerent country, exactly as if they were established by and sitting in the neutral country, and as if they always adjudicated conformably to the international law common to both; yet it is well known that, in practice, such tribunals do take for their guide the prize ordinances and instructions issued by the belligerent sovereign, without stopping to inquire whether they are consistent with the paramount rule. If, therefore, the final sentences of these tribunals were to be considered as absolutely conclusive, so as to

(*z*) Wheaton's Hist. Law of Nations, pp. 206—217.

preclude all inquiry into their merits, the obvious consequence would be to invest the belligerent State with legislative power over the rights of neutrals, and to prevent them from showing that the ordinances and instructions, under which the sentences have been pronounced, are repugnant to that law by which foreigners alone are bound.

§ 397. Danish indemnities under treaty of 1830.

These principles have received recent confirmation in the negotiation between the American and Danish governments respecting the captures of American vessels and cargoes made by the cruisers of Denmark during the last war between that power and Great Britain. In the course of this negotiation, it was objected by the Danish ministers that the validity of these captures had been finally determined in the competent prize court of the belligerent country, and could not be again drawn in question. On the part of the American government it was admitted that the jurisdiction of the tribunals of the capturing nation was exclusive and complete upon the question of prize or no prize, so as to transfer the property in the things condemned from the original owner to the captors, or those claiming under them; that the final sentence of those tribunals is conclusive as to the change of property operated by it, and cannot be again incidentally drawn in question in any other judicial forum; and that it has the effect of closing for ever all private controversy between the captors and the captured. The demand which the United States made upon the Danish government was not for a judicial revision and reversal of the sentences pronounced by its tribunals, but for the indemnity to which the American citizens were entitled in consequence of the denial of justice by the tribunals in the last resort, and of the responsibility thus incurred by the Danish Government for the acts of its cruisers and tribunals. The Danish government was, of course, free to adopt any measures it might think proper, to satisfy itself of the injustice of those sentences, one of the most natural of which would be a re-examination and discussion of the cases complained of, conducted by an impartial tribunal under the sanction of the two governments, not for the purpose of disturbing the question of title to the specific property which had been irrevocably condemned, or of reviving the controversy between the individual captors and claimants which had been for ever

terminated, but for the purpose of determining between government and government whether injustice had been done by the tribunals of one power against the citizens of the other, and of determining what indemnity ought to be granted to the latter.

The accuracy of this distinction was acquiesced in by the Danish ministers, and a treaty concluded, by which a satisfactory indemnity was provided for the American claimants (*a*).

§ 397a. Municipal laws administered in prize courts.

It is a question of great nicety how far a prize court is bound to enforce a municipal law against foreigners when that municipal law is contrary to the law of nations. In a case before Lord Stowell it was argued that the Orders in Council of 1807 were a violation of international law, and that he was therefore bound to disregard them. His lordship was of opinion that as the Orders in Council were retaliatory, they did not contravene the law of nations, but he added, "I have no hesitation in saying that they would cease to be just if they ceased to be retaliatory; and they would cease to be retaliatory from the moment the enemy retracts, in a sincere manner, those measures of his which they were intended to retaliate" (*b*). Sir R. Phillimore is of opinion "that it has never been the doctrine of the British Prize Courts that, because they sit under the authority of the Crown, the Crown has authority to prescribe to them rules which violate international law" (*c*).

§ 398. Title to real property, how transferred in war—*Jus postliminii.*

We have seen that a firm possession, or a sentence of a competent court, is sufficient to confirm the captor's title to personal property or movables taken in war. A different rule is applied to real property, or immovables. The original owner of this species of property is entitled to what is called the benefit of postliminy, and the title acquired in war must be confirmed by a treaty of peace before it can be considered as completely valid. This rule cannot be frequently applied to the case of mere private property, which by the general usage of modern nations is exempt from confiscation. It only becomes practically important in questions arising out of alienations of real property, belonging to the government, made by the opposite belligerent, while in the military occupation of the country. Such a title must be expressly con-

(*a*) Martens, Nouveau Recueil, tom. viii. p. 350.
(*b*) [*The Fox*, Edw. Ad. 312.]
(*c*) [Phillimore, vol. iii. § 436. *The Recovery*, 6 C. Rob. 348; *The Snipe*, Edw. Ad. 381; *The Maria*, 1 C. Rob. 350; *The Ostsee*, 9 Moo. P. C. 150.]

firmed by the treaty of peace, or by the general operation of the cession of territory made by the enemy in such treaty. Until such confirmation, it continues liable to be divested by the *jus postliminii*. The purchaser of any portion of the national domain takes it at the peril of being evicted by the original sovereign owner when he is restored to the possession of his dominions (*d*).

§ 399. Good faith towards enemies.

Grotius has devoted a whole chapter of his great work to prove, by the consenting testimony of all ages and nations, that good faith ought to be observed towards an enemy. And even Bynkershoek, who holds that every other sort of fraud may be practised towards him, prohibits perfidy, upon the ground that his character of enemy ceases by the compact with him, so far as the terms of that compact extend. "I allow of any kind of deceit," says he, "perfidy alone excepted, not because anything is unlawful against an enemy, but because when our faith has been pledged to him, so far as the promise extends, he ceases to be an enemy." Indeed, without this mitigation, the horrors of war would be indefinite in extent and interminable in duration. The usage of civilized nations has therefore introduced certain *commercia belli*, by which the violence of war may be allayed, so far as is consistent with its objects and purposes, and something of a pacific intercourse may be kept up, which may lead, in time, to an adjustment of differences, and ultimately to peace (*e*).

§ 400. Truce or armistice.

There are various modes in which the extreme rigour of the rights of war may be relaxed at the pleasure of the respective belligerent parties. Among these is that of a suspension of hostilities, by means of a truce or armistice. This may be either general or special. If it be general in its application to all hostilities in every place, and is to endure for a very long or indefinite period, it amounts in effect to a temporary peace, except that it leaves undecided

(*d*) Grotius, de Jur. Bel. ac Pac. lib. iii. cap. 6, § 4; cap. 9, § 13. Vattel, Droit des Gens, liv. iii. ch. 13, §§ 197—200, 210, 212. Klüber, Droit des Gens Moderne de l'Europe, §§ 256—258. Martens, Précis, &c., liv. viii. ch. 4, § 282, *a*. Where the case of conquest is complicated with that of civil revolution, and a change of internal government recognized by the nation itself and by foreign States, a modification of the rule may be required in its practical application. *Vide ante*, Pt. I. ch. 2, § 28, *et seq.*

(*e*) Bynkershoek, Quæst. Jur. Pub. lib. i. cap. 1. *The Daifje*, 3 C. Rob. 139.

the controversy in which the war originated. Such were the truces formerly concluded between the Christian powers and the Turks. Such, too, was the armistice concluded, in 1609, between Spain and her revolted provinces in the Netherlands. A partial truce is limited to certain places, such as the suspension of hostilities, which may take place between two contending armies, or between a besieged fortress and the army by which it is invested (*f*).

§ 401. Power to conclude an armistice.

The power to conclude a universal armistice or suspension of hostilities is not necessarily implied in the ordinary official authority of the general or admiral commanding in chief the military or naval forces of the State. The conclusion of such a general truce requires either the previous special authority of the supreme power of the State, or a subsequent ratification by such power (*g*).

A partial truce or limited suspension of hostilities may be concluded between the military and naval officers of the respective belligerent States, without any special authority for that purpose, where, from the nature and extent of their commands, such an authority is necessarily implied as essential to the fulfilment of their official duties (*h*).

§ 402. Period of its operation.

A suspension of hostilities binds the contracting parties, and all acting immediately under their direction, from the time it is concluded; but it must be duly promulgated in order to have a force of legal obligation with regard to the other subjects of the belligerent States; so that if, before such notification, they have committed any act of hostility, they are not personally responsible, unless their ignorance be imputable to their own fault or negligence. But as the supreme power of the State is bound to fulfil its own engagements, or those made by its authority, express or implied, the government of the captor is bound, in the case of a suspension of hostilities by sea, to restore all prizes made in contravention of the armistice. To prevent the disputes and difficulties arising from such questions, it is usual to stipulate in the convention of armistice, as in treaties of peace, a

(*f*) Vattel, Droit des Gens, liv. iii. ch. 16, §§ 235, 236.
(*g*) Grotius, de Jur. Bel. ac Pac. lib. iii. cap. 22, § 8. Barbeyrac's Note. Vattel, Droit des Gens, liv. iii. ch. 16, §§ 233—238.
(*h*) *Vide ante*, Pt. iii. ch. 2, §§ 254, 255.

prospective period within which hostilities are to cease, with a due regard to the situation and distance of places (*i*).

§ 403. Rules for interpreting conventions of truce.

Besides the general maxims applicable to the interpretation of all international compacts, there are some rules peculiarly applicable to conventions for the suspension of hostilities. The *first* of these peculiar rules, as laid down by Vattel, is that each party may do within his own territory, or within the limits prescribed by the armistice, whatever he could do in time of peace. Thus either of the belligerent parties may levy and march troops, collect provisions and other munitions of war, receive reinforcements from his allies, or repair the fortifications of a place not actually besieged.

The *second* rule is, that neither party can take advantage of the truce to execute, without peril to himself, what the continuance of hostilities might have disabled him from doing. Such an act would be a fraudulent violation of the armistice. For example:—in the case of a truce between the commander of a fortified town and the army besieging it, neither party is at liberty to continue works, constructed either for attack or defence, or to erect new fortifications for such purposes. Nor can the garrison avail itself of the truce to introduce provisions or succours into the town, through the passages or in any other manner which the besieging army would have been competent to obstruct and prevent, had hostilities not been interrupted by the armistice.

The *third* rule stated by Vattel, is rather a corollary from the preceding rules than a distinct principle capable of any separate application. As the truce merely suspends hostilities without terminating the war, all things are to remain in their antecedent state in the places, the possession of which was specially contested at the time of the conclusion of the armistice (*k*).

It is obvious that the contracting parties may, by express compact, derogate in any and every respect from these general conditions.

§ 404. Recommencement

At the expiration of the period stipulated in the truce, hostilities recommence as a matter of course, without any

(*i*) Grotius, de Jur. Bel. ac Pac. lib. iii. cap. 21, § 5. Vattel, Droit des Gens, liv. iii. ch. 16, § 239.

(*k*) Vattel, Droit des Gens, liv. iii. ch. 16, §§ 245—251.

of hostilities on the expiration of truce.

new declaration of war. But if the truce has been concluded for an indefinite, or for a very long period, good faith and humanity concur in requiring previous notice to be given to the enemy of an intention to terminate what he may justly regard as equivalent to a treaty of peace. Such was the duty inculcated by the Fecial college upon the Romans, at the expiration of a long truce which they had made with the people of Veii. That people had recommenced hostilities before the expiration of the time limited in the truce. Still it was held necessary for the Romans to send heralds and demand satisfaction before renewing the war (*l*).

§ 405. Capitulations for the surrender of troops and fortresses.

Capitulations for the surrender of troops, fortresses, and particular districts of country, fall naturally within the scope of the general powers entrusted to military and naval commanders. Stipulations between the governor of a besieged place, and the general or admiral commanding the forces by which it is invested, if necessarily connected with the surrender, do not require the subsequent sanction of their respective sovereigns. Such are the usual stipulations for the security of the religion and privileges of the inhabitants, that the garrison shall not bear arms against the conquerors for a limited period, and other like clauses properly incident to the particular nature of the transaction. But if the commander of the fortified town undertake to stipulate for the perpetual cession of that place, or enter into other engagements not fairly within the scope of his implied authority, his promise amounts to a mere *sponsion* (*m*).

§ 406. Convention of the Caudine Forks.

The celebrated convention made by the Roman consuls with the Samnites, at the Caudine Forks, was of this nature. The conduct of the Roman senate in disavowing this ignominious compact, is approved by Grotius and Vattel, who hold that the Samnites were not entitled to be placed in *statu quo*, because they must have known that the Roman consuls were wholly unauthorized to make such a convention. This consideration seems sufficient to justify the Romans in acting on this occasion according to their uniform uncompromising policy, by delivering up to the Samnites the authors of the

(*l*) Liv. Hist. lib. iv. cap. 30. As to the laws of war observed by the Romans, see Wheaton's Hist. Law of Nations, pp. 20—25.

(*m*) *Vide ante*, Pt. iii. ch. 2, § 255.

treaty, and persevering in the war until this formidable enemy was finally subjugated (*n*).

§ 407. Convention of Closter-Seven.

The convention concluded at Closter-Seven, during the seven years' war, between the Duke of Cumberland, commander of the British forces in Hanover, and Marshal Richelieu, commanding the French army, for a suspension of arms in the north of Germany, is one of the most remarkable treaties of this kind recorded in modern history. It does not appear, from the discussions which took place between the two governments on this occasion, that there was any disagreement between them as to the true principles of international law applicable to such transactions. The conduct, if not the language of both parties, implies a mutual admission that the convention was of a nature to require ratification, as exceeding the ordinary powers of mere military commanders in respect to mere military capitulations. The same remark may be applied to the convention signed at El Arish, in 1800, for the evacuation of Egypt by the French army; although the position of the two governments, as to the convention of Closter-Seven, was reversed in that of El Arish, the British government refusing in the first instance to permit the execution of the latter treaty upon the ground of the defect in Sir Sidney Smith's powers, and, after the battle of Heliopolis, insisting upon its being performed by the French, when circumstances had varied and rendered its execution no longer consistent with their policy and interest. Good faith may have characterized the conduct of the British government in this instance, as was strenuously insisted by ministers in the parliamentary discussions to which the treaty gave rise, but there is at least no evidence of perfidy on the part of General Kleber. His conduct may rather be compared with that of the Duke of Cumberland at Closter-Seven (and it certainly will not suffer by the comparison), in concluding a convention suited to existing circumstances, which it was plainly his interest to carry into effect when it was signed, and afterwards refusing to abide by it when those circumstances were materially changed. In these compacts, time is material: indeed it may be said to be of the very essence of the contract. If

(*n*) See the account given by Livy of this remarkable transaction.

anything occurs to render its immediate execution impracticable, it becomes of no effect, or at least is subject to be varied by fresh negotiation (*o*).

§ 408. Passports, safe-conducts, and licenses.

Passports, safe-conducts, and licenses, are documents granted in war to protect persons and property from the general operation of hostilities. The competency of the authority to issue them depends on the general principles already noticed. This sovereign authority may be vested in military and naval commanders, or in certain civil officers, either expressly, or by inevitable implication from the nature and extent of their general trust. Such documents are to be interpreted by the same rules of liberality and good faith with other acts of the sovereign power (*p*).

§ 409. Licenses to trade with the enemy.

Thus a license granted by the belligerent State to its own subjects, or to the subjects of its enemy, to carry on a trade interdicted by war, operates as a dispensation with the laws of war, so far as its terms can be fairly construed to extend. The adverse belligerent party may justly consider such documents of protection as *per se* a ground of capture and confiscation; but the maritime tribunals of the State, under whose authority they are issued, are bound to consider them as lawful relaxations of the ordinary state of war. A license is an act proceeding from the sovereign authority of the State, which alone is competent to decide on all the considerations of political and commercial expediency, by which such an exception from the ordinary consequences of war must be controlled. Licenses, being high acts of sovereignty, are necessarily *stricti juris*, and must not be carried further than the intention of the authority which grants them may be supposed to extend. Not that they are to be construed with pedantic accuracy, or that every small deviation should be held to vitiate their fair effect. An excess in the quantity of goods permitted might not be considered as noxious to any extent, but a variation in their quality or substance might be more significant, because a liberty assumed of importing one species of goods, under a license to import another, might

(*o*) Flassan, Histoire de la Diplomatie Française, tom. vi. pp. 97—107. Annual Register, vol. i. pp. 209—213, 228—234; vol. xlii. p. [219], pp. 223—233. State Papers, vol. xliii. pp. [28—34].

(*p*) Grotius, de Jur. Bel. ac Pac. lib. iii. cap. 21, § 14. Vattel, Droit des Gens, liv. iii. ch. 17, §§ 265—277.

lead to very dangerous consequences. The limitations of time, persons, and places, specified in the license, are also material. The great principle in these cases is, that subjects are not to trade with the enemy, nor the enemy's subjects with the belligerent State, without the special permission of the government; and a material object of the control which the government exercises over such a trade is, that it may judge of the fitness of the persons, and under what restrictions of time and place such an exemption from the ordinary laws of war may be extended. Such are the general principles laid down by Sir W. Scott for the interpretation of these documents; but Grotius lays down the general rule, that safe-conducts, of which these licenses are a species, are to be liberally construed; *laxa quàm stricta intérpretatio admittenda est.* And during the last war, licenses were eventually interpreted with great liberality in the British Courts of Prize (*q*).

§ 410. Authority to grant licenses.

It was made a question in some cases in those courts, how far these documents could protect against British capture, on account of the nature and extent of the authority of the persons by whom they were issued. The leading case on this subject is that of *The Hope*, an American ship, laden with corn and flour, captured whilst proceeding from the United States to the ports of the Peninsula occupied by the British troops, and claimed as protected by an instrument granted by the British consul at Boston, accompanied by a certified copy of a letter from the admiral on the Halifax station. In pronouncing judgment in this case, Sir W. Scott observed, that the instrument of protection, in order to be effectual, must come from those who have a competent authority to grant such a protection, but that the papers in question came from persons who were vested with no such authority. To exempt the property of enemies from the effect of hostilities is a very high act of sovereign authority; if at any time delegated to persons in a subordinate station, it must be exercised either by those who have a special commission granted to them for the particular business, and who, in legal language, are called *mandatories;* or by persons in whom such a power is vested

(*q*) Chitty's Law of Nations, ch. 7. Kent's Commentaries on American Law, vol. i. p. 163, note (*b*), 5th edit.

in virtue of any situation to which it may be considered incidental. It was quite clear that no consul in any country, particularly in an enemy's country, is vested with any such power in virtue of his station. *Ei rei non præponitur*, and, therefore, his acts in relation to it are not binding. Neither does the admiral, on any station, possess such authority. He has, indeed, power relative to the ships under his immediate command, and can restrain them from committing acts of hostility; but he cannot go beyond that; he cannot grant a safeguard of this kind beyond the limits of his own station. The protections, therefore, which had been set up did not result from any power incidental to the situation of the persons by whom they had been granted; and it was not pretended that any such power was specially intrusted to them for the particular occasion. If the instruments which had been relied upon by the claimants were to be considered as the naked acts of those persons, then they were, in every point of view, totally invalid. But the question was, whether the British government had taken any steps to ratify these proceedings, and thus to convert them into valid acts of state; for persons not having full power may make what, in law, are termed *sponsiones*, or, in diplomatic language, treaties *sub spe rati*, to which a subsequent ratification may give validity: *ratihabitio mandato æquiparatur*. The learned judge proceeded to show, that the British government had confirmed the acts of its officers, by the Order in Council of the 26th October, 1813, and accordingly decreed restitution of the property. In the case of *The Reward*, before the Lords of Appeal, the principle of this judgment was substantially confirmed; but in that of *The Charles*, and other similar cases, where certificates or passports of the same kind, signed by Admiral Sawyer, and also by the Spanish minister in the United States, had been used for voyages from thence to the Spanish West Indies, the Lords of Appeal held that these documents, not being included within the terms of the confirmatory Order in Council, did not afford protection. In the cases of passports granted by the British minister in the United States, permitting American vessels to sail with provisions from thence to the island of St. Bartholomew, but not confirmed by an Order in Council, the

Lords condemned in all the cases not expressly included within the terms of the Order in Council, by which certain descriptions of licenses granted by the minister had been confirmed (*r*).

§ 410a. Vitiation of licenses.

A license may be vitiated by fraudulent conduct in obtaining it. The misrepresentation or suppression of material facts renders the license a nullity, and exposes the property it is invoked to protect to certain condemnation (*s*). A license must also be used in the manner intended by the grantor. "It is a mistake to suppose that the right of user may not be prejudiced by a construction of the grant that is merely erroneous. It is absolutely essential that the will of the grantor shall be observed; so that, that only shall be done which he intended to permit; whatever he did not mean to permit is absolutely interdicted. Hence the party who uses the license, engages, not only for fair intentions, but for an accurate interpretation and execution of the grant" (*t*). In America it was determined that under the Act of the 13th July, 1861, the President was the only functionary who could grant a license to trade with the enemy. All other licenses were held to be void, and therefore ships licensed by any one else were condemned; and persons acting under any but the President's licenses were held to be trading with the enemy (*u*).

§ 411. Ransom of captured property.

The contract made for the ransom of enemy's property, taken at sea, is generally carried into effect by means of a safe-conduct granted by the captors, permitting the captured vessel and cargo to proceed to a designated port, within a limited time. Unless prohibited by the law of the captor's own country, this document furnishes a complete legal protection against the cruisers of the same nation, or its allies, during the period, and within the geographical limits, prescribed by its terms. This protection results from the general authority to capture, which is delegated by the belligerent State to its commissioned cruisers, and which involves the power to ransom captured property, when judged advantageous. If the ransomed vessel is lost by the perils of the sea, before her arrival, the obligation to pay the sum stipulated for her ransom is not thereby extinguished. The captor guarantees the captured vessel against being interrupted in its course, or retaken, by other cruisers of his nation, or its

(*r*) *The Hope*, 1 Dods. Ad. 226; Ibid. Appendix (D.). Stewart's Vice-Adm. Rep. p. 367.

(*s*) [Duer on Insurance, I. p. 598. *The Cosmopolite*, 4 C. Rob. 11; *The Clio*, 6 C. Rob. 69. Halleck, ch. xxviii. § 6.]

(*t*) [Duer on Insurance, I., p. 598. *Vandyck* v. *Whitmore*, 1 East. 475.]

(*u*) [*The Sea Lion*, 5 Wallace, 630; *The Ouachita Cotton*, 6 Wallace, 521; *M'Kee* v. *U. S.*, 8 Wallace, 167; *The Reform*, 3 Wallace, 617.]

allies, but he does not insure against losses by the perils of the seas. Even where it is expressly agreed that the loss of the vessel by these perils shall discharge the captured from the payment of the ransom, this clause is restrained to the case of a total loss on the high seas, and is not extended to shipwreck or stranding, which might afford the master a temptation fraudulently to cast away his vessel, in order to save the most valuable part of the cargo, and avoid the payment of the ransom. Where the ransomed vessel, having exceeded the time or deviated from the course prescribed by the ransom-bill, is retaken, the debtors of the ransom are discharged from their obligation, which is merged in the prize, and the amount is deducted from the net proceeds thereof, and paid to the first captor, whilst the residue is paid to the second captor. So if the captor, after having ransomed a vessel belonging to the enemy, is himself taken by the enemy, together with the ransom-bill, of which he is the bearer, this ransom-bill becomes a part of the capture made by the enemy; and the persons of the hostile nation, who were debtors of the ransom, are thereby discharged from their obligation. The death of the hostage taken for the faithful performance of the contract on the part of the captured does not discharge the contract; for the captor trusts to him as a collateral security only, and by losing it does not also lose his original security, unless there is an express agreement to that effect (*x*).

Sir William Scott states, in the case of *The Hoop*, that as to ransoms, which are contracts arising *ex jure belli*, and tolerated as such, the enemy was not permitted to sue in the British courts of justice in his own proper person for the payment of the ransom, even before British subjects were prohibited by the statute 22 Geo. III. cap. 25, from ransoming enemy's property; but the payment was enforced by an action brought by the imprisoned hostage in the courts of his own country for the recovery of his freedom. But the effect of such a contract, like that of every other which may be lawfully entered into between belligerents, is to suspend the character of enemy so far as respects the parties to the ransom-bill; and

(*x*) Pothier, Traité de Propriété, Nos. 134-137. Valin, sur l'Ordonnance, liv. iii. tit. 9; des Prises, art. 19. Traité des Prises, ch. 11, Nos. 1—3.

consequently, the technical objection of the want of a *persona standi in judicio* cannot, on principle, prevent a suit being brought by the captor directly on the ransom-bill. And this appears to be the practice in the maritime courts of the European continent (*y*).

§ 411a. British law of ransom.

The Naval Prize Act, 1864, gives power to Her Majesty in council to make such orders as may seem expedient for prohibiting or allowing the ransom of British ships taken as prize by the enemy. If any person ransoms or agrees to ransom any ship or goods in contravention of such orders, he may on conviction be fined any sum not exceeding £500 by the Admiralty Court (*z*).

§ 411b. The Brussels Conference, 1874.

In 1874, a Conference assembled at Brussels, on the invitation of the Emperor of Russia, for the purpose of discussing a project of international rules on the laws and usages of war. A series of rules on the subjects considered in this chapter was agreed to, and these will be found to contain the ideas respecting the intercourse of belligerents at present prevailing on the continent of Europe. The Conference was attended by delegates from all the countries of Europe, but no international compact was entered into. "A careful consideration of the whole matter," wrote Lord Derby, "has convinced Her Majesty's government that it is their duty firmly to repudiate, on behalf of Great Britain and her allies in any future war, any project for altering the principles of international law upon which this country has hitherto acted, and above all, to refuse to be a party to any agreement, the effect of which would be to facilitate aggressive wars, and to paralyse the patriotic efforts of an invaded people" (*a*). Nevertheless, though not absolutely binding, the rules are of immense value in exhibiting the prevailing ideas in a definite form (*b*.)

PROJECT OF AN INTERNATIONAL DECLARATION CONCERNING THE LAWS AND CUSTOMS OF WAR.

Of Military Authority over the Hostile State.

§ 411c.

Article 1. A territory is considered as occupied when it is actually placed under the authority of the hostile army.

The occupation only extends to those territories where this authority is established and can be exercised.

Art. 2. The authority of the legal power being suspended, and having actually passed into the hands of the occupier, he shall take every step in his power to re-establish and secure, as far as possible, public safety and social order.

(*y*) *The Hoop*, 1 C. Rob. 201. See Lord Mansfield's judgment in the case of *Ricord* v. *Bettenham*, Burrow's Rep. p. 1734; Pothier, Propriété, Nos. 136, 137.

(*z*) [27 & 28 Vict. c. 25, s. 45. And see *Maisonnaire* v. *Keating*, 2 Gallison, 337; *Miller* v. *The Resolution*, 2 Dallas, 15.]

(*a*) [Lord Derby to Lord A. Loftus, 20th January, 1875. Hertslet, Map of Europe, vol. iii. p. 1976.]

(*b*) [The whole of the proceedings of the Conference will be found in Parl. Papers, Miscellaneous (No. 1), 1875.]

Art 3. With this object he will maintain the laws which were in force in the country in time of peace, and will only modify, suspend, or replace them by others if necessity obliges him to do so.

Art. 4. The functionaries and officials of every class who at the instance of the occupier consent to continue to perform their duties, shall be under his protection. They shall not be dismissed or be liable to summary punishment (*punis disciplinairement*), unless they fail in fulfilling the obligations they have undertaken, and shall be handed over to justice, only if they violate those obligations by unfaithfulness.

Art. 5. The army of occupation shall only levy such taxes, dues, duties, and tolls as are already established for the benefit of the State, or their equivalent, if it be impossible to collect them, and this shall be done as far as possible in the form of, and according to, existing practice. It shall devote them to defraying the expenses of the administration of the country to the same extent as was obligatory on the legal government.

Art. 6. The army occupying a territory shall take possession only of the specie, the funds, and marketable securities, &c. (*valeurs exigibles*), which are the property of the State in its own right, the depôts of arms, means of transport, magazines and supplies, and, in general, all the personal property of the State, which is of a nature to aid in carrying on the war.

Railway plant, land telegraphs, steam and other vessels, not included in cases regulated by maritime law, as well as depôts of arms, and generally every kind of munitions of war, although belonging to companies or to private individuals, are to be considered equally as means of a nature to aid in carrying on a war, which cannot be left by the army of occupation at the disposal of the enemy. Railway plant, land telegraphs, as well as the steam and other vessels above mentioned shall be restored, and indemnities be regulated on the conclusion of peace.

Art. 7. The occupying State shall only consider itself in the light of an administrator and usufructuary of the public buildings, real property, forests, and agricultural works belonging to the hostile State, and situated in the occupied territory. It is bound to protect these properties (*fonds de ces propriétés*), and to administer them according to the laws of usufruct.

Art. 8. The property of parishes (*communes*), of establishments devoted to religion, charity, education, arts and sciences, although belonging to the State, shall be treated as private property.

Every seizure, destruction of, or wilful damage to such establishments, historical monuments, or works of art or of science, should be prosecuted by the competent authorities.

Of those who are to be recognized as Belligerents: of Combatants and Non-Combatants.

Art. 9. The laws, rights, and duties of war are applicable not only to the army, but likewise to militia and corps of volunteers complying with the following conditions :— § 411d.

1. That they have at their head a person responsible for his subordinates ;

2. That they wear some settled distinctive badge recognizable at a distance;

3. That they carry arms openly; and

4. That, in their operations, they conform to the laws and customs of war.

In those countries where the militia form the whole or part of the army, they shall be included under the denomination of "army."

Art. 10. The population of a non-occupied territory, who, on the approach of the enemy, of their own accord take up arms to resist the invading troops, without having had time to organize themselves in conformity with Article 9, shall be considered as belligerents, if they respect the laws and customs of war.

Art. 11. The armed forces of the belligerents may be composed of combatants and non-combatants. In the event of being captured by the enemy, both one and the other shall enjoy the rights of prisoners of war.

Of the means of injuring the Enemy.

§ 411e. Art. 12. The laws of war do not allow to belligerents an unlimited power as to the choice of means of injuring the enemy.

Art. 13. According to this principle are strictly forbidden—

(*a.*) The use of poison or poisoned weapons.

(*b.*) Murder by treachery of individuals belonging to the hostile nation or army.

(*c.*) Murder of an antagonist who, having laid down his arms, or having no longer the means of defending himself, has surrendered at discretion.

(*d.*) The declaration that no quarter will be given.

(*e.*) The use of arms, projectiles, or substances (*matières*), which may cause unnecessary suffering, as well as the use of the projectiles prohibited by the declaration of St. Petersburgh in 1868.

(*f.*) Abuse of the flag of truce, the national flag, or the military insignia or uniform of the enemy, as well as the distinctive badges of the Geneva Convention.

(*g.*) All destruction or seizure of the property of the enemy which is not imperatively required by the necessity of war.

Art. 14. Stratagems (*ruses de guerre*), and the employment of means necessary to procure intelligence respecting the enemy or the country (*terrain*), (subject to the provisions of Article 36), are considered as lawful means.

Of Sieges and Bombardments.

§ 411f. Art. 15. Fortified places are alone liable to be besieged. Towns, agglomerations of houses or villages, which are open or undefended, cannot be attacked or bombarded.

Art. 16. But if a town or fortress, agglomeration of houses, or village, be defended, the commander of the attacking forces should, before commencing a bombardment and except in the case of surprise, do all in his power to warn the authorities.

Art. 17. In the like case, all necessary steps should be taken to spare, as far as possible, buildings devoted to religion, arts, sciences and charity,

hospitals, and places where sick and wounded are collected, on condition that they are not used at the same time for military purposes.

It is the duty of the besieged to indicate these buildings by special visible signs, to be notified beforehand by the besieged.

Art. 18. A town taken by storm shall not be given up to the victorious troops to plunder.

Of Spies.

Art. 19. No one shall be considered as a spy but those who, acting secretly or under false pretences, collect or try to collect information in districts occupied by the enemy, with the intention of communicating it to the opposing force. § 411g.

Art. 20. A spy, if taken in the act, shall be tried and treated according to the laws in force in the army which captures him.

Art. 21. If a spy who rejoins the army to which he belongs is subsequently captured by the enemy, he is to be treated as a prisoner of war, and incurs no responsibility for his previous acts.

Art. 22. Military men (*les militaires*), who have penetrated within the zone of operations of the enemy's army, with the intention of collecting information, are not considered as spies if it has been possible to recognize their military character.

In like manner military men, (and also non-military persons carrying out their mission openly,) charged with the transmission of despatches either to their own army or to that of the enemy, shall not be considered as spies if captured by the enemy.

To this class belong also, if captured, individuals sent in balloons to carry despatches, and generally to keep up communications between the different parts of an army or of a territory.

Of Prisoners of War.

Art. 23. Prisoners of war are lawful and disarmed enemies. They are in the power of the enemy's government, but not of the individuals or of the corps who made them prisoners. § 411h.

They should be treated with humanity.

Every act of insubordination authorizes the necessary measures of severity to be taken with regard to them.

All their personal effects except their arms are considered to be their own property.

Art. 24. Prisoners of war are liable to internment in a town, fortress, camp, or in any locality whatever, under an obligation not to go beyond certain fixed limits; but they may not be placed in confinement (*enfermés*), unless absolutely necessary as a measure of security.

Art. 25. Prisoners of war may be employed on certain public works which have no immediate connection with the operations on the theatre of war, provided the employment be not excessive, nor humiliating to their military rank, if they belong to the army, or to their official or social position, if they do not belong to it.

They may also, subject to such regulations as may be drawn up by the military authorities, undertake private work.

The pay they receive will go towards ameliorating their position, or will be placed to their credit at the time of their release. In this case the cost of their maintenance may be deducted from their pay.

Art. 26. Prisoners of war cannot be compelled in any way to take any part whatever in carrying on the operations of war.

Art. 27. The government, in whose power are the prisoners of war, undertakes to provide for their maintenance.

The conditions of such maintenance may be settled by a mutual understanding between the belligerents.

In default of such an understanding, and as a general principle, prisoners of war shall be treated, as regards food and clothing, on the same footing as the troops of the government who made them prisoners.

Art. 28. Prisoners of war are subject to the laws and regulations in force in the army in whose power they are.

Arms may be used, after summoning, against a prisoner attempting to escape. If retaken, he is subject to summary punishment (*peines disciplinaires*), or to a stricter surveillance.

If after having escaped he is again made prisoner, he is not liable to any punishment for his previous escape.

Art. 29. Every prisoner is bound to declare, if interrogated on the point, his true names and rank, and in the case of his infringing this rule, he will incur a restriction of the advantages granted to the prisoners of the class to which he belongs.

Art. 30. The exchange of prisoners of war is regulated by mutual agreement between the belligerents.

Art. 31. Prisoners of war may be released on parole if the laws of their country allow of it, and in such a case they are bound on their personal honour to fulfil scrupulously, as regards their own government, as well as that which made them prisoners, the engagements they have undertaken.

In the same case their own government should neither demand nor accept from them any service contrary to their parole.

Art. 32. A prisoner of war cannot be forced to accept release on parole, nor is the enemy's government obliged to comply with the request of a prisoner claiming to be released on parole.

Art. 33. Every prisoner of war liberated on parole, and retaken carrying arms against the government to which he had pledged his honour, may be deprived of the rights accorded to prisoners of war, and may be brought before the tribunals.

Art. 34. Persons in the vicinity of armies, but who do not directly form part of them, such as correspondents, newspaper reporters, "vivandiers," contractors, &c., may also be made prisoners of war.

These persons should, however, be furnished with a permit issued by a competent authority, as well as with a certificate of identity.

Of the Sick and Wounded.

§ 411*i*. Art. 35. The duties of belligerents, with regard to the treatment of sick and wounded, are regulated by the Convention of Geneva of the 22nd August, 1864, subject to the modifications which may be introduced into that Convention.

Of the Military Power with respect to Private Individuals. § 411j.

Art. 36. The population of an occupied territory cannot be compelled to take part in military operations against their own country.

Art. 37. The population of occupied territories cannot be compelled to swear allegiance to the enemy's power.

Art. 38. The honour and rights of the family, the life and property of individuals, as well as their religious convictions, and the exercise of their religion should be respected.

Private property cannot be confiscated.

Art. 39. Pillage is expressly forbidden.

Of Contributions and Requisitions.

Art. 40. As private property should be respected, the enemy will demand from parishes (*communes*), or the inhabitants, only such payments and services as are connected with the necessities of war generally acknowledged in proportion to the resources of the country, and which do not imply, with regard to the inhabitants, the obligation of taking part in the operations of war against their own country. § 411k.

Art. 41. The enemy, in levying contributions, whether as equivalents or taxes (*vide* Article 5), or for payments which should be made in kind, or as fines, will proceed, as far as possible, according to the rules of the distribution and assessment of the taxes in force in the occupied territory.

The civil authorities of the legal government will afford their assistance, if they have remained in office.

Contributions can be imposed only on the order and on the responsibility of the general-in-chief, or of the superior civil authority established by the enemy in the occupied territory.

For every contribution a receipt shall be given to the person furnishing it.

Art. 42. Requisitions shall be made only by the authority of the commandant of the locality occupied.

For every requisition an indemnity shall be granted, or a receipt given.

Of Flags of Truce.

Art. 43. An individual authorized by one of the belligerents to confer with the other, on presenting himself with a white flag, accompanied by a trumpeter (bugler or drummer), or also by a flag-bearer, shall be recognized as the bearer of a flag of truce. He, as well as the trumpeter (bugler or drummer), and the flag-bearer, who accompany him, shall have the right of inviolability. § 411l.

Art. 44. The commander to whom a bearer of a flag of truce is despatched, is not obliged to receive him under all circumstances and conditions.

It is lawful for him to take all measures necessary for preventing the bearer of the flag of truce taking advantage of his stay within the radius of the enemy's position, to the prejudice of the latter; and if the bearer of the flag of truce is found guilty of such a breach of confidence, he has the right to detain him temporarily.

He may equally declare beforehand that he will not receive bearers of flags of truce during a certain period. Envoys presenting themselves

after such a notification from the side to which it has been given, forfeit their right to inviolability.

Art. 45. The bearer of a flag of truce forfeits his right of inviolability, if it be proved in a positive and irrefutable manner that he has taken advantage of his privileged position to incite to, or commit an act of treachery.

Of Capitulations.

§ 411m. Art. 46. The conditions of capitulations shall be discussed by the contracting parties.

These conditions should not be contrary to military honour.

When once settled by a Convention they should be scrupulously observed by both sides.

Of Armistices.

§ 411n. Art. 47. An armistice suspends warlike operations by a mutual agreement between the belligerents. Should the duration thereof not be fixed, the belligerents may resume operations at any moment; provided, however, that proper warning be given to the enemy, in accordance with the conditions of the armistice.

Art. 48. An armistice may be general or local. The former suspends all warlike operations between the belligerents; the latter only those between certain portions of the belligerent armies, and within a fixed radius.

Art. 49. An armistice should be notified officially and without delay to the competent authorities and to the troops. Hostilities are suspended immediately after the notification.

Art. 50. It rests with the contracting parties to define in the clauses of the armistice the relations which shall exist between the populations.

Art. 51. The violation of the armistice by either of the parties gives to the other the right of terminating it (*le dénoncer*).

Art. 52. The violation of the clauses of an armistice by private individuals, on their own personal initiative, only affords the right of demanding the punishment of the guilty persons, and, if there is occasion for it, an indemnity for losses sustained.

Of Belligerents interned, and of Wounded treated, in Neutral Territory.

§ 411o. Art. 53. The neutral State receiving in its territory troops belonging to the belligerent armies, will intern them, so far as it may be possible, away from the theatre of war.

They may be kept in camps, or even confined in fortresses, or in places appropriated to this purpose.

It will decide whether the officers may be released on giving their parole not to quit the neutral territory without authority.

Art. 54. In default of a special agreement the neutral State which receives the belligerent troops will furnish the interned with provisions, clothing, and such aid as humanity demands.

The expenses incurred by the internment will be made good at the conclusion of peace.

Art. 55. The neutral State may authorize the transport across its

territory of the wounded and sick belonging to the belligerent armies, provided that the trains which convey them do not carry either the *personnel* or *matériel* of war.

In this case the neutral State is bound to take the measures necessary for the safety and control of the operation.

Art. 56. The Convention of Geneva is applicable to the sick and wounded interned on neutral territory.

CHAPTER III.

RIGHTS OF WAR AS TO NEUTRALS.

§ 412. Definition of neutrality.

It deserves to be remarked, that there are no words in the Greek or Latin language which precisely answer to the English expressions, *neutral* and *neutrality*. The terms *neutralis*, *neutralitas*, which are used by some modern writers, are barbarisms, not to be met with in any classical author. The Roman civilians and historians make use of the words *amici*, *medii*, *pacati*, *socii*, which are very inadequate to express what we understand by *neutrals*, and they have no substantive whatever corresponding to *neutrality*. The cause of this deficiency is obvious. According to the laws of war, observed even by the most civilized nations of antiquity, the right of one nation to remain at peace, whilst other neighbouring nations were engaged in war, was not admitted to exist. He who was not an ally was an enemy; and as no intermediate relation was known, so no word had been invented to express such relation. The modern public jurists, who wrote in the Latin language, were consequently driven to the necessity of inventing terms to express those international relations which were unknown to the Pagan nations of antiquity, and which had grown out of a milder dispensation, struggling against the inveterate customs of the dark ages which preceded the revival of letters. Grotius terms neutrals *medii*, "middle men" (*a*). Bynkershoek, in treating of the subject of neutrality, says:—"*Non hostes* appello, qui neutrarum partium sunt, nec ex fœdere his illisve quicquam debent; si quid debeant, Fœderati sunt, non simpliciter Amici" (*b*).

(*a*) Grotius, de Jur. Bel. ac Pac. lib. iii. cap. 9.

(*b*) "I call *neutrals* (*non hostes*) those who take part with neither of the belligerent powers, and who are not bound to either by any alliance. If they are so bound, they are no longer *neutrals* but *allies*." Bynkershoek, Quæst. Jur. Pub. lib. i. cap. 9. De Statu belli inter non hostes. We shall hereafter see that this definition is merely applicable to that species of neutrality which is not modified by special compact.

§ 413. Different species of neutrality.

There are two species of neutrality recognized by international law. These are—1st, Natural, or perfect neutrality; and 2nd, Imperfect, qualified, or conventional neutrality.

§ 414. Perfect neutrality.

1. Natural, or perfect neutrality, is that which every sovereign State has a right, independent of positive compact, to observe in respect to the wars in which other States may be engaged.

The right of every independent State to remain at peace, whilst other States are engaged in war, is an incontestible attribute of sovereignty. It is, however, obviously impossible, that neutral nations should be wholly unaffected by the existence of war between those communities with whom they continue to maintain their accustomed relations of friendship and commerce. The rights of neutrality are connected with correspondent duties. Among these duties is that of impartiality between the contending parties. The neutral is the common friend of both parties, and consequently is not at liberty to favour one party to the detriment of the other (*c*). Bynkershoek states it to be "the duty of neutrals to be every way careful not to interfere in the war, and to do equal and exact justice to both parties. *Bello se non interponant*," that is to say, "as to what relates to the war, let them not prefer one party to the other, and this is the only proper conduct for neutrals. A neutral has nothing to do with the justice or injustice of the war; it is not for him to sit as judge between his friends, who are at war with each other, and to grant or refuse more or less to the one or the other, as he thinks that their cause is more or less just or unjust. If I am a neutral, I ought not to be useful to the one, in order that I may hurt the other" (*d*).

These, Bynkershoek adds, are "the duties applicable to the condition of those powers who are not bound by any alliance,

(*c*) Bynkershoek, Quæst. Jur. Pub. lib. i. cap. 9. Vattel, Droit des Gens, liv. iii. ch. 7, §§ 103—110.

(*d*) "Horum officium est, omni modo cavere, ne se bello interponant, et his quàm illis partibus sint vel æquiores vel iniquiores. . . . *Bello se non interponant*, hoc est, in causâ belli alterum alteri ne perferant, et eo solo recte defunguntur, qui neutrarum partium sunt. . . . Si recte judico, belli justitia vel injustitia nihil quicquam pertinet ad communem amicum; ejus non est, inter utrumque amicum, sibi invicem hostem, sedere judicem, et ex causâ æquiore vel iniquiore huic illive plus nimisve tribuere vel negare. Si medius sim, alteri non possum prodesse, ut alteri noceam." Bynkershoek, Quæst. Jur. Pub. lib. i. cap. ix.

but are in a state of *perfect* neutrality. These I merely call *friends*, in order to distinguish them from confederates and allies" (*e*).

§ 415. Imperfect neutrality.

2. Imperfect, qualified, or conventional neutrality, is that which is modified by special compact.

The public law of Europe affords several examples of this species of neutrality.

§ 416. Neutrality of the Swiss Confederation.

1. Thus the political independence of the confederated Cantons of Switzerland, which had so long existed in fact, was first formally recognized by the Germanic Empire, of which they originally constituted an integral portion, at the peace of Westphalia, in 1648. The Swiss Cantons had observed a prudent neutrality during the thirty years war, and from this period to the war of the French Revolution, their neutrality had been, with some slight exceptions, respected by the bordering States. But this neutrality was qualified by the special compact existing between the Confederation, or the separate Cantons and foreign States, forming treaties of alliance or capitulations for the enlistment of Swiss troops in the service of those States. The policy of respecting the neutrality of Switzerland was mutually felt by the two great monarchies of France and Austria, during their long contest for supremacy under the houses of Bourbon and Hapsburg. Such is the peculiar geographical position of Switzerland, between Germany, France, and Italy, among the stupendous mountain chains from which flow the great rivers, the Danube, the Rhine, the Rhone, and the Po, that if the passage through the Swiss territories were open to the Austrian armies, they might communicate freely from the valley of the Danube to the valley of the Po, and thus menace the frontier of France from Basle to Nice. To guard against this impending danger, France must be fortified along the whole of this frontier; whilst, on the other hand, if the passes of the Swiss Alps are shut against her enemy, she may concentrate all her forces upon the Rhine; since all history shows that the attempts of the Imperialists to penetrate into the southern

(*e*) "Exposui compendio quod mihi videtur de officio eorum, qui ex fœdere nihil quicquam debent, sed perfectè sunt neutrarum partium. Hos simpliciter *Amicos* appellavi, ut à Fœderatis et Sociis distinguerem." Bynkershoek, Quæst. Jur. Pub. lib. i. cap. 9

provinces of France by the Var have ever failed, owing to the remoteness and difficulty of the scene of operations. The advantages to be derived by France from the permanent neutrality of Switzerland are therefore manifest. Nor is this neutrality less essential to the security of Austria. Let Switzerland once become a lawful battle ground for the bordering States, and the French armies would be sure to anticipate its occupation by the Austrians. The two great Austrian armies operating, whether for offence or defence, the one in Swabia, the other in Italy, being separated by the massive rampart of the Alps, would have no means of communicating with each other; whilst the French forces, advancing from the Lake of Constance on the one side, and the great chain of the Alps on the other, might attack either the flank of the Austrian army in Swabia or the rear of its army in Italy (*f*).

§ 417. Switzerland during wars of French revolution.

During the wars of the French Revolution the neutrality of Switzerland was alternately violated by both the great contending parties, and her once peaceful valleys became the bloody scene of hostilities between the French, Austrian, and Russian armies. The expulsion of the allied forces, and the subsequent withdrawal of the French army of occupation, were followed by violent internal dissensions which were finally composed by the mediation of Bonaparte as First Consul of the French Republic, in 1803. A treaty of alliance was simultaneously concluded between the Republic and the Helvetic Confederation. According to the stipulations of this treaty, the neutrality of Switzerland was recognized by France, whilst the Confederation stipulated not to grant a passage through its territories to the armies of France, and to oppose such passage by force of arms in case of its being attempted. The Confederation also engaged to permit the enlisting of eight thousand Swiss troops for the service of France, in addition to the sixteen thousand troops to be furnished according to the capitulation signed on the same day with the treaty. It was, at the same time, expressly declared that its alliance being merely defensive, should not, in any

(*f*) Thiers, Histoire du Consulat et de l'Empire, tom. i. liv. 3 p. 182.

respect, be construed to prejudice the neutrality of Switzerland (*g*).

§ 418. Proposal of the allies to Switzerland in 1815.

When the allied armies advanced to invade the French territory, in 1813, the Austrian corps under Prince Schwartzenberg passed through the territory of Switzerland, and crossed the Rhine at three different places, at Basle, Lauffenberg, and Shaffhausen, without opposition on the part of the federal troops. The perpetual neutrality of Switzerland was, nevertheless, recognized by the final act of the Congress of Vienna, March 20th, 1815 (*h*); but on the return of Napoleon from the Island of Elba, the allied powers invited the Confederation to accede to the general coalition against France. In the official note delivered by their ministers to the Diet at Zurich, on the 6th of May, 1815, it was stated, that although the allied powers expected that Switzerland would not hesitate to unite with them in accomplishing the common object of alliance, which was to prevent the re-establishment of the usurped revolutionary authority in France, yet they were far from proposing to Switzerland the development of a military force disproportioned to her resources and to the usages of her people. They respected the military system of a nation, which, uninfluenced by the spirit of ambition, armed for the single purpose of defending its independence and its tranquillity. The allied powers well knew the importance attached by Switzerland to the maintenance of the principle of her neutrality; and it was not with the purpose of violating this principle, but with the view of accelerating the epoch when it might become applicable in an advantageous and permanent manner, that they proposed to the Confederation to assume an attitude and to adopt energetic measures, proportioned to the extraordinary circumstances of the moment without at the same time forming a rule for the future (*i*).

§ 419. Reply of the Swiss Diet.

In the answer of the Diet to this note, dated the 12th May, 1815, it was declared, that the relations which Switzerland maintained with the allied powers, and with them only, could leave no doubt as to her views and intentions. She would

(*g*) Schoell, Histoire des Traités de Paix, tom. ii. ch. 33, p. 339.
(*h*) Wheaton's Hist. Law of Nations, p. 493.
(*i*) Martens, Nouveau Recueil, tom. ii. p. 166.

persist in them with that constancy and fidelity which had at all times distinguished the Swiss character. Twenty-two small republics, united together for their security and the maintenance of their independence, must seek for their national strength in the principle of their Confederation. This resulted inevitably from the nature of things, the geographical position, the constitution, and the character of the Swiss people. A consequence of this principle was the neutrality of Switzerland, recognized as the basis of its future relations with all other States. It followed from the same principle, that the most efficacious participation of Switzerland in the great struggle which was about to take place, must necessarily consist in the defence of her frontiers. In adopting this course, she did not separate herself from the common cause of the allied powers, which thus became her own national cause. The defence of a frontier fifty leagues in length, serving as a *point d'appui* for the movements of two armies, was in itself a co-operation not only real, but also of the highest importance. More than thirty thousand men had already been levied for this purpose. Determined to maintain this development of her forces, Switzerland had a right to expect from the favourable disposition of the allied powers, that, so long as she did not claim their assistance, their armies would respect the integrity of her territory. Assurances to this effect on their part were absolutely necessary in order to tranquillize the Swiss people, and engage them to support with fortitude the burden of an armament so considerable (*k*).

On the 20th of May, 1815, a convention was concluded at Zurich, to regulate the accession of Switzerland to the general alliance between Austria, Great Britain, Prussia, and Russia; by which the allied powers stipulated, that, in case of urgency, where the common interest rendered necessary a temporary passage across any part of the Swiss territory, recourse should be had to the authority of the Diet for that purpose. The left wing of the allied army accordingly passed the Rhine between Basle and Rheinfelden, and entered France through the territory of Switzerland (*l*).

(*k*) Martens, tom. ii. p. 170. (*l*) Ibid.

§ 420. Declaration of 1815 as to Swiss neutrality.

On the re-establishment of the general peace, a declaration was signed at Paris, on the 20th November, 1815, by the four allied powers and France, by which these five powers formally recognized the perpetual neutrality of Switzerland, and guaranteed the integrity and inviolability of her territory within its new limits, as established by the final act of the Congress of Vienna, and by the Treaty of Paris of the above date. They also declared that the neutrality and inviolability of Switzerland, and her independence of all foreign influence, were conformable to the true interests of the policy of all Europe, and that no inference unfavourable to the rights of Switzerland, in respect to her neutrality, ought to be drawn from the circumstances which had led to the passage of a part of the allied forces across the Helvetic territory. This passage, freely granted by the cantons in the convention of the 20th May, was the necessary result of the entire adherence of Switzerland to the principles manifested by the allied powers in the treaty of alliance of the 25th March (*m*).

§ 420 a. Neutrality of part of Savoy.

At the second Peace of Paris, 1815, the allied powers agreed that the neutrality of Switzerland should be extended to a portion of Savoy, at that time a part of the kingdom of Sardinia (*n*). In 1860, Savoy was transferred by Sardinia to France. By the second article of the Treaty of Transfer it was provided "that his Majesty the King of Sardinia cannot transfer the neutralized parts of Savoy, except on the conditions upon which he himself possesses them, and that it will appertain to his Majesty the Emperor of the French to come to an understanding on this subject, both with the powers represented at the Congress of Vienna, and with the Swiss Confederation, and to give them the guaranties required by the stipulations referred to in this article" (*o*). No such understanding has, however, yet been arrived at (*p*). At the outbreak of the Franco-German war, the Swiss Government declared that Switzerland would maintain and defend during that war her neutrality and the integrity of her territory by all the means in her power; and that if violence was offered to that neutrality she would energetically repulse every aggression. With reference to the neutralized parts of Savoy, the Swiss Government reminded the powers that Switzerland had a right to occupy that territory, and that the right would be exercised in accordance with the treaties respecting it, should circumstances require its exercise for the defence of Swiss neutrality (*q*).

(*m*) Martens, tom. iv. p. 186.
(*n*) [Art. iii. Hertslet, Map of Europe, vol. i. p. 346.]
(*o*) [Ibid. vol. ii. p. 1430.]
(*p*) [Calvo, vol. ii. § 1046.]
(*q*) [Note of Swiss Government, 18th July, 1870.

The French Minister, the Duc de Grammont, replied that "he had not rejected nor even contested the right so claimed by Switzerland, but had confined himself to declaring that, under the eventualities referred to, it would have to be made the subject of special arrangement between the two governments" (r). The question did not arise, as the war did not extend to that part of France.

§ 421. Neutrality of Belgium.

2. The geographical position of Belgium, forming a natural barrier between France on the one side, and Germany and Holland on the other, would seem to render the independence and neutrality of the first-mentioned country as essential to the preservation of peace between the latter powers, as is that of Switzerland to its maintenance between France and Austria. Belgium covers the most vulnerable point of the northern frontier of France against invasion from Prussia, whilst it protects the entrance of Germany against the armies of France, on a frontier less strongly fortified than that of the Rhine from Basle to Mayence. But so long as the low countries belonged to the house of Austria, either of the Spanish or the German branch, these provinces had been, for successive ages, the battle-ground on which the great contending powers of Europe struggled for the supremacy. The security of the independence of Holland against the encroachments of France was provided for by the barrier-treaties concluded at Utrecht, in 1713, and at Antwerp, in 1715, between Austria, Great Britain, and Holland, by which the fortified towns on the southern frontier of the Austrian Netherlands were to be permanently garrisoned with Dutch troops. The kingdom of the Netherlands was created by the Congress of Vienna, in 1815, for the purpose of forming a barrier for Germany against France; and on the dissolution of that kingdom into its original component parts, the perpetual neutrality of Belgium was guaranteed by the five great European powers, and made an essential condition of the recognition of her independence, in the treaties for the separation of Belgium from Holland (s).

§ 421a. Belgian neutrality in 1870.

In 1870, treaties were entered into by England with France and Prussia for the maintenance of the neutrality of Belgium during the war, each of the belligerents binding themselves to co-operate with

(r) [Archives Diplomatiques, 1871–2, Pt. I. p. 262.]
(s) Wheaton's Hist. Law of Nations, p. 552.

England in case this neutrality was violated by the other. These treaties were to last during the war, and for twelve months after the ratification of any treaty of peace (*t*).

§ 422. Neutrality of Cracow.

3. We have already seen that by the final act of the Congress of Vienna, 1815, art. 6, the city of Cracow, with its territory, is declared to be a perpetually free, independent, and neutral State, under the joint protection of Austria, Prussia, and Russia (*u*). The neutrality, thus created by special compact, and guaranteed by the three protecting powers, is made dependent upon the reciprocal obligation of the city of Cracow not to afford an asylum, or protection, to fugitives from justice, or military deserters belonging to the territories of those powers. How far the neutrality of the free and independent State thus created has been actually respected by the protecting powers, or how far the successive temporary occupations of its territory by their military forces, and how far their repeated forcible interference in its internal affairs, may have been justified by the nonfulfilment of the above obligation on the part of Cracow, or by other circumstances authorizing such interference according to the general principles of international law, are questions which have given rise to diplomatic discussions between the great European powers, contracting parties to the treaties of Vienna, but which are foreign to the present object (*x*).

§ 423. Conventional or guaranteed neutrality.

The permanent neutrality of Switzerland, Belgium, and Cracow, has thus been solemnly recognized as part of the public law of Europe. But the conventional neutrality thus created differs essentially from that natural or perfect neutrality which every State has a right to observe, independent of special compact, in respect to the wars in which other States may be engaged. The consequences of the latter species of neutrality only arise in case of hostilities. It does not exist in time of peace, during which the State is at liberty to contract any eventual engagements it thinks fit as to political relations with other States. A permanent neutral State, on the other hand, by accepting this condition of its political

(*t*) [Hertslet, Map of Europe, vol. iii. pp. 1886—1891.]
(*u*) *Vide supra*, Pt. I. ch. 2, § 34, note (*d*).
(*x*) Wheaton's Hist. Law of Nations, pp. 441—445.

existence, is bound to avoid in time of peace every engagement which might prevent its observing the duties of neutrality in time of war. As an independent State, it may lawfully exercise, in its intercourse with other States, all the attributes of external sovereignty. It may form treaties of amity, and even of alliance with other States; provided it does not thereby incur obligations, which, though perfectly lawful in time of peace, would prevent its fulfilling the duties of neutrality in time of war. Under this distinction, treaties of offensive alliance, applicable to a specific case of war between any two or more powers, or guaranteeing their possessions, are of course interdicted to the permanently neutral State. But this interdiction does not extend to defensive alliances formed with other neutral States for the maintenance of the neutrality of the contracting parties against any power by which it might be threatened with violation (*y*).

The question remains, whether this restriction on the sovereign power of the permanently neutral State is confined to political alliances and guaranties, or whether it extends to treaties of commerce and navigation with other States. Here it again becomes necessary to distinguish between the two cases of natural and perfect, or qualified and conventional neutrality. In the case of ordinary neutrality, the neutral State is at liberty to regulate its commercial relations with other States according to its own view of its national interests, provided this liberty be not exercised so as to affect that impartiality which the neutral is bound to observe towards the respective belligerent powers. Vattel states, that the impartiality which a neutral nation is bound to observe, relates solely to the war. "In whatever does not relate to the war, a neutral and impartial nation will not refuse to one of the belligerent parties, on account of its present quarrel, what it grants to the other. This does not deprive the neutral of the liberty of making the advantage of the State the rule of its conduct in its negotiations, its friendly connections, and its commerce. When this reason induces it to give preferences in things which are at the free disposal of the possessor, the neutral nation only makes use of its right,

(*y*) Arendt, Essai sur la Neutralité de la Belgique, pp. 87—95.

and is not chargeable with partiality. But to refuse any of these things to one of the belligerent parties, merely because he is at war with the other, and in order to favour the latter, would be departing from the line of strict neutrality" (z).

These general principles must be modified in their application to a permanently neutral State. The liberty of regulating its commercial relations with other foreign States, according to its own views of its national interests, which is an essential attribute of national independence, does not authorize the permanently neutral State to contract obligations in time of peace inconsistent with its peculiar duties in time of war.

§ 424. Neutrality modified by a limited alliance with one of the belligerent parties.

Neutrality may also be modified by antecedent engagements, by which the neutral is bound to one of the parties to the war. Thus the neutral may be bound by treaty, previous to the war, to furnish one of the belligerent parties with a limited succour in money, troops, ships, or munitions of war, or to open his ports to the armed vessels of his ally, with their prizes. The fulfilment of such an obligation does not necessarily forfeit his neutral character, nor render him the enemy of the other belligerent nation, because it does not render him the general associate of its enemy (a).

How far a neutrality, thus limited, may be tolerated by the opposite belligerent, must often depend more upon considerations of policy than of strict right. Thus, where Denmark, in consequence of a previous treaty of defensive alliance, furnished limited succours in ships and troops to the Empress Catharine II. of Russia, in the war of 1788 against Sweden, the abstract right of the Danish court to remain neutral, except so far as regarded the stipulated succours, was scarcely contested by Sweden and the allied mediating powers. But it is evident, from the history of these transactions, that if the war had continued, the neutrality of Denmark would not have been tolerated by these powers, unless she had withheld from her ally the succours stipulated by the treaty of

(z) Vattel, Droit des Gens, liv. iii. ch. 7, § 104.

(a) Bynkershoek, Quæst. Jur. Pub. lib. i. cap. ix. Vattel, Droit des Gens, liv. iii. ch. 6, §§ 101—105. As to the general principles to be applied to such treaties, and when the *casus fœderis* arises, *vide supra*. Pt. III. ch. 2. §§ 279, 280.

1773, or Russia had consented to dispense with its fulfilment (*b*).

§ 424a. Right to make such treaties.

"There remains," says Sir R. Phillimore, "the grave question whether a State has any right to stipulate in time of peace, that, when the time of war arrives, it will do the act of a belligerent and yet claim the immunity of a neutral." The learned author concludes that a State has no right to enter into such a stipulation, and then to claim neutrality while fulfilling it; and this seems to be the better opinion (*c*).

§ 424b. Loans to belligerents by neutrals.

It has happened, not unfrequently, that neutral subjects who sympathise with a belligerent have raised loans for the purpose of assisting him in the war. In 1823, the Law Officers of the Crown gave an opinion to the effect that such subscriptions for the use of one of two belligerents, entered into by individual subjects of a neutral, are inconsistent with that neutrality, and contrary to the law of nations. Such subscriptions would not give the other belligerent the right to consider this as an act of hostility, although, if carried to any considerable extent, they might afford a just ground of complaint. If a loan is purely commercial, and real interest be charged for the money, it is then no infringement of neutrality (*d*). In 1873, Mr. Gladstone expressed a strong disapproval in the House of Commons of a gratuitous loan then being raised in England for the Spanish Pretender, Don Carlos (*e*). It seems also to be considered inconsistent with neutrality in America to allow loans to be raised by a belligerent in a neutral State (*f*).

§ 425. Qualified neutrality, arising out of antecedent treaty stipulations, admitting the armed vessels and prizes of one belligerent into the neutral ports, whilst those of the other are excluded.

Another case of qualified neutrality arises out of treaty stipulations antecedent to the commencement of hostilities, by which the neutral may be bound to admit the vessels of war of one of the belligerent parties, with their prizes, into his ports, whilst those of the other may be entirely excluded, or only admitted under limitations and restrictions. Thus, by the treaty of amity and commerce of 1778, between the United States and France, the latter secured to herself two special privileges in the American ports:—1. Admission for her privateers, with their prizes, to the exclusion of her enemies. 2. Admission for her public ships of war, in case of urgent necessity, to refresh, victual, repair, &c., but not exclusively of other nations at war with her. Under these stipulations, the United States not being expressly bound to

(*b*) Annual Register, vol. xxx. pp. 181, 182. State Papers, p. 292. Eggers, Leben Von Bernstorf, 2 abtheil, pp. 118—195.

(*c*) [Phillimore, vol. iii. § 146. Calvo, vol. ii. § 1062.]

(*d*) [See Phillimore, vol. iii. Appendix, p. 928. See *De Wutz* v. *Hendricks*, Moore, Com. Pleas, 586.]

(*e*) [The *Times*, 25th April, 1873.]

(*f*) [Field, International Code (2nd ed.), p. 616. *Kennet* v. *Chambers*, 14 Howard, 38.]

exclude the public ships of the enemies of France, granted an asylum to British vessels and those of other powers at war with her. Great Britain and Holland still complained of the exclusive privileges allowed to France in respect to her privateers and prizes, whilst France herself was not satisfied with the interpretation of the treaty by which the public ships of her enemies were admitted into the American ports. To the former, it was answered by the American government, that they enjoyed a perfect equality, qualified only by the exclusive admission of the privateers and prizes of France, which was the effect of a treaty made long before, for valuable considerations, not with a view to circumstances such as had occurred in the war of the French Revolution, nor against any nation in particular, but against all nations in general, and which might, therefore, be observed without giving just offence to any (*g*).

On the other hand, the minister of France asserted the right of arming and equipping vessels for war, and of enlisting men, within the neutral territory of the United States. Examining this question under the law of nations and the general usage of mankind, the American government produced proofs, from the most enlightened and approved writers on the subject, that a neutral nation must, in respect to the war, observe an exact impartiality towards the belligerent parties; that favours to the one, to the prejudice of the other, would import a fraudulent neutrality, of which no nation would be the dupe; that no succour ought to be given to either, unless stipulated by treaty, in men, arms, or anything else, directly serving for war; that the right of raising troops being one of the rights of sovereignty, and consequently appertaining exclusively to the nation itself, no foreign power can levy men within the territory without its consent; that, finally, the Treaty of 1778, making it unlawful for the enemies of France to arm in the United States, could not be construed affirmatively into a permission to the French to arm in those ports, the treaty being express as to the prohibition, but silent as to the permission (*h*).

(*g*) Mr. Jefferson's Letter to Mr. Hammond and Mr. Van Berckel, Sept. 9, 1793. Waite's State Papers, vol. i. pp. 169, 172.

(*h*) Mr. Jefferson's Letter to Mr. G. Morris, Aug. 6, 1793. Waite's State Papers, vol. i. p. 140.

§ 426. Hostilities within the territory of the neutral State.

The rights of war can be exercised only within the territory of the belligerent powers, upon the high seas, or in a territory belonging to no one. Hence it follows, that hostilities cannot lawfully be exercised within the territorial jurisdiction of the neutral State, which is the common friend of both parties (*i*).

§ 427. Passage through the neutral territory.

This exemption extends to the passage of an army or fleet through the limits of the territorial jurisdiction, which can hardly be considered an innocent passage, such as one nation has a right to demand from another; and, even if it were such an innocent passage, is one of those *imperfect* rights, the exercise of which depends upon the consent of the proprietor, and which cannot be compelled against his will. It may be granted or withheld, at the discretion of the neutral State; but its being granted is no ground of complaint on the part of the other belligerent power, provided the same privilege is granted to him, unless there be sufficient reasons for withholding it (*j*).

The extent of the maritime territorial jurisdiction of every State bordering on the sea has already been described (*k*).

§ 428. Captures within the maritime territorial jurisdiction, or by vessels stationed within it, or hovering on the coasts.

Not only are all captures made by the belligerent cruisers within the limits of this jurisdiction absolutely illegal and void, but captures made by armed vessels stationed in a bay or river, or in the mouth of a river, or in the harbour of a neutral State, for the purpose of exercising the rights of war from this station, are also invalid. Thus, where a British privateer stationed itself within the river Mississippi, in the neutral territory of the United States, for the purpose of exercising the rights of war from the river, by standing off and on, obtaining information at the Balize, and overhauling vessels in the course down the river, and made the capture in question within three English miles of the alluvial islands formed at its mouth, restitution of the captured vessel was decreed by Sir W. Scott. So, also, where a belligerent ship, lying within neutral territory, made a capture with her boats

(*i*) Bynkershoek, Quæst. Jur. Pub. lib. i. cap. 8. Martens, des Prises et Reprises, ch. 2, § 18.

(*j*) *Vide ante*, Pt. II. ch. iv. § 193. Vattel, Droit des Gens, liv. iii. ch. 7, §§ 119—131. Grotius, de Jur. Bel. ac Pac. lib. ii. cap. 2, § 13. Sir W. Scott, 3 C. Rob. 353.

(*k*) *Vide ante*, Pt. II. ch. 4, §§ 177—180.

out of the neutral territory, the capture was held to be invalid; for though the hostile force employed was applied to the captured vessel lying out of the territory, yet no such use of a neutral territory for the purposes of war is to be permitted. This prohibition is not to be extended to *remote* uses, such as procuring provisions and refreshments, which the law of nations universally tolerates; but no *proximate* acts of war are in any manner to be allowed to originate on neutral ground (*l*).

§ 428 a. Case of *The Chesapeake.*

In 1863, during the civil war, the United States' merchant-ship *Chesapeake*, while on a voyage from New York to Portland, was seized upon by a number of her passengers, who killed and wounded some of the crew, and put the rest on shore. They ran the vessel to several small ports in Nova Scotia, representing her as the Confederate war-steamer *Retribution*, and finally abandoned her off Sambro, a port of Nova Scotia. *The Chesapeake* was there found and captured by a United States ship-of-war, and taken to Halifax. There were then on board two British subjects who had been employed by the passengers as engineers; and Wade, one of the ringleaders, was discovered on board a small schooner lying near where *The Chesapeake* had been abandoned. The three men were made prisoners, and conveyed to Halifax. In the discussion resulting from this case, the United States disclaimed any intention of exercising jurisdiction in the waters of Nova Scotia, and explained that their naval authorities had acted "under the influence of a patriotic and commendable zeal to bring to punishment outlaws who had offended against the peace and dignity of both countries" (*m*). It was admitted that these acts were in strictness of law "a violation of the law of nations, and of the friendly relations existing between the two countries." This was deemed a satisfactory explanation by Her Majesty's Government. England was entitled to look upon this capture as, *primâ facie*, a belligerent act. The civil war was flagrant at the time, and *The Chesapeake* had been originally seized by persons representing themselves as acting on behalf of the Confederates. As a matter of fact, they failed to produce any valid belligerent commission; but this did not give the United States any right to capture the ship in British waters. Beyond seizing the vessel, the passengers had committed no piratical acts. They were thus entitled to prove themselves belligerents if they could, and their failure to do this laid them open to the charge of piracy. The United States demanded the extradition of the persons captured with the vessel, but the British Government insisted on their being first released and set upon British soil, and they managed to escape before they could be re-arrested. The ship itself was restored to the owners. Some of the parties concerned afterwards appeared in

(*l*) *The Anna*, 5 C. Rob. 373; *The Twee Gebroeders*, July, 1800, 3 ibid. 162.
(*m*) [Mr. Seward to Lord Lyons, 9th Jan. 1864.]

Canada, and were apprehended, but the Court decided that they could not be extradited (*n*).

§ 428 b. Capture of *The Florida*.

In 1864, a most flagrant violation of neutral jurisdiction was perpetrated by a United States ship-of-war. *The Florida*, the well-known Confederate cruiser, entered the port of Bahia, in Brazil, to obtain provisions and coals, and to effect some necessary repairs; and while there *The Wachusett*, a Federal man-of-war, also entered the port. The Brazilian authorities took all necessary measures to prevent a conflict, and assigned a berth in the harbour to each ship. During the night, and while a large part of *The Florida's* crew were on shore, *The Wachusett* steamed across the harbour, fastened a cable to *The Florida*, towed her out to sea, and escaped from the pursuit of the local forces. The Brazilian Government demanded an explanation and reparation. Mr. Seward, in a somewhat haughty reply, admitted "that the President would disavow and regret the proceedings at Bahia," but he persisted in maintaining that *The Florida* was a pirate, and "that the harbouring and supplying piratical ships and their crews in Brazilian Ports were wrongs and injuries for which Brazil justly owes reparation to the United States." The captured crew of *The Florida* were, however, set at liberty, and the vessel herself sank in Hampton Roads by "an unforseen accident which cast no responsibility upon the United States" (*o*). The absurdity of calling *The Florida* a pirate at that period of the war is manifest; but had she been the most atrocious of pirates, her capture under such circumstances would have been wholly unjustifiable.

§ 429. Vessels chased into the neutral territory, and there captured.

Although the immunity of the neutral territory from the exercise of any act of hostility is generally admitted, yet an exception to it has been attempted to be raised in the case of a hostile vessel met on the high seas and pursued; which it is said may, in the pursuit, be chased within the limits of a neutral territory. The only text writer of authority who has maintained this anomalous principle is Bynkershoek (*p*). He admits that he had never seen it mentioned in the writings of the public jurists, or among any of the European nations, the Dutch only excepted; thus leaving the inference open, that even if reasonable in itself, such a practice never rested upon authority, nor was sanctioned by general usage. The extreme caution, too, with which he guards this license to belligerents, can hardly be reconciled with the practical

(*n*) [See Parl. Papers, 1876, N. America (No. 10). Wheaton, by Dana, note 207.]

(*o*) [Parl. Papers, 1873, N. America (No. 2), pp. 176—178.]

(*p*) Quæst. Jur. Pub. lib. i. cap. 8. This opinion of Bynkershoek, in which Casaregis seems to concur, is reprobated by several other public jurists. Azuni, Diritto Marittimo, Pt. I. c. 4, art. 1. Valin, Traité des Prises, ch. 4, § 3, No. 4, art. 1. D'Habreu, Sobre las Prisas, Pt. I. ch. 4, § 15.

exercise of it; for how is an enemy to be pursued in a hostile manner within the jurisdiction of a friendly power, without imminent danger of injuring the subjects and property of the latter? *Dum fervet opus*—in the heat and animation excited against the flying foe, there is too much reason to presume that little regard will be paid to the consequences that may ensue to the neutral. There is, then, no exception to the rule, that every voluntary entrance into neutral territory, with hostile purposes, is absolutely unlawful. "When the fact is established," says Sir W. Scott, "it overrules every other consideration. The capture is done away; the property must be restored, notwithstanding that it may actually belong to the enemy" (*q*).

§ 430. Claim on the ground of violation of neutral territory must be sanctioned by the neutral State.

Though it is the duty of the captor's country to make restitution of the property thus captured within the territorial jurisdiction of the neutral State, yet it is a technical rule of the Prize Courts to restore to the individual claimant, in such a case, only on the application of the neutral government whose territory has been thus violated. This rule is founded upon the principle, that the neutral State alone has been injured by the capture, and that the hostile claimant has no right to appear for the purpose of suggesting the invalidity of the capture (*r*).

§ 430a. Capture in neutral waters.

This can hardly be called a technical rule, and Mr. Wheaton himself admits it to be founded upon principle. The Supreme Court has recently determined that neither an enemy, nor a neutral acting the part of an enemy, can demand restitution on the sole ground of capture in neutral waters. This fact alone will not prevent condemnation if done without intent to violate neutral jurisdiction (*s*). Lord Stowell also said long ago, "It is a known principle of this Court that the privilege of territory will not itself enure to the protection of property, unless the State from which that protection is due steps forward to assert the right" (*t*).

§ 431. Restitution by the neutral State of

Where a capture of enemy's property is made within neutral territory, or by armaments unlawfully fitted out within the same, it is the right as well as the duty of the neutral

(*q*) *The Vrow Anna Catharina*, 5 C. Rob. 15.
(*r*) Case of *The Etrusco*, 3 C. Rob. Note; *The Anne*, 3 Wheaton, 447.
(*s*) [*The Adela*, 6 Wallace, 266.]
(*t*) [*The Purissima Concepcion*, 6 C. Rob. 45. See also, *The Sir William Peel*, 5 Wallace, 585.]

State, where the property thus taken comes into its possession, to restore it to the original owners. This restitution is generally made through the agency of the courts of admiralty and maritime jurisdiction. Traces of the exercise of such a jurisdiction are found at a very early period in the writings of Sir Leoline Jenkins, who was Judge of the English High Court of Admiralty in the reigns of Charles II. and James II. In a letter to the king in council, dated October 11, 1675, relating to a French privateer seized at Harwich with her prize, (a Hamburg vessel bound to London,) Sir Leoline states several questions arising in the case, among which was, "Whether this Hamburgher, being taken within one of your Majesty's chambers, and being bound for one of your ports, ought not to be set free by your Majesty's authority, notwithstanding he were, if taken upon the high seas out of those chambers, a lawful prize. I do humbly conceive he ought to be set free, upon a full and clear proof that he was within one of the king's chambers at the time of the seizure, which he, in his first memorial, sets forth to have been eight leagues at sea, over against Harwich. King James (of blessed memory) his direction, by proclamation, March 2nd, 1604, being that all officers and subjects, by sea and land, shall rescue and succour all merchants and others, as shall fall within the danger of such as shall await the coasts, in so near places to the hinderance of trade outward and homeward; and all foreign ships, when they are within the king's chambers, being understood to be within the places intended in those directions, must be in safety and indemnity, or else when they are surprised must be restored to it, otherwise they have not the protection worthy of your Majesty, and of the ancient reputation of those places. But this being a point not lately settled by any determination, (that I know of, in case where the king's chambers precisely, and under that name, came in question,) is of that importance as to deserve your Majesty's declaration and assertion of that right of the crown by an act of State in Council, your Majesty's coasts being now so much infested with foreign men-of-war, that there will be frequent use of such a decision" (*u*).

property captured within its jurisdiction, or otherwise in violation of its neutrality. Captures within the *King's Chambers.*

(*u*) Life and Works of Sir L. Jenkins, vol. ii. p. 727.

Whatever doubts there may be as to the extent of the territorial jurisdiction thus asserted, as entitled to the neutral immunity, there can be none as to the sense entertained by this eminent civilian respecting the right and the duty of the neutral sovereign to make restitution where his territory is violated.

§ 432. Extent of the neutral jurisdiction along the coasts and within the bays and rivers.

When the maritime war commenced in Europe, in 1793, the American government, which had determined to remain neutral, found it necessary to define the extent of the line of territorial protection claimed by the United States on their coasts, for the purpose of giving effect to their neutral rights and duties. It was stated on this occasion, that governments and writers on public law had been much divided in opinion as to the distance from the sea-coast within which a neutral nation might reasonably claim a right to prohibit the exercise of hostilities. The character of the coast of the United States, remarkable in considerable parts of it for admitting no vessel of size to pass near the shore, it was thought would entitle them in reason to as broad a margin of protected navigation as any nation whatever. The government, however, did not propose, at that time, and without amicable communications with the foreign powers interested in that navigation, to fix on the distance to which they might ultimately insist on the right of protection. President Washington gave instructions to the executive officers to consider it as restrained, for the present, to the distance of one sea league, or three geographical miles, from the sea-shores. This distance, it was supposed, could admit of no opposition, being recognized by treaties between the United States, and some of the powers with whom they were connected in commercial intercourse, and not being more extensive than was claimed by any of them on their own coasts. As to the bays and rivers, they had always been considered as portions of the territory, both under the laws of the former colonial government and of the present union, and their immunity from belligerent operations was sanctioned by the general law and usage of nations. The 25th article of the treaty of 1794, between Great Britain and the United States, stipulated that "neither of the said parties shall permit the ships or goods belonging to the citizens or subjects of the other, to be taken

within cannon-shot of the coast, nor in any of the bays, ports, or rivers, of their territories, by ships of war, or others, having commissions from any prince, republic, or State whatever. But in case it should so happen, the party whose territorial rights shall thus have been violated, shall use his utmost endeavours to obtain from the offending party full and ample satisfaction for the vessel or vessels so taken, whether the same be vessels of war or merchant vessels." Previously to this treaty with Great Britain, the United States were bound by treaties with three of the belligerent nations, (France, Prussia, and Holland,) to protect and defend, "by all the means in their power," the vessels and effects of those nations in their ports or waters, or on the seas near their shores, and to recover and restore the same to the right owner when taken from them. But they were not bound to make compensation if *all the means in their power* were used, and failed in their effect. Though they had, when the war commenced, no similar treaty with Great Britain, it was the President's opinion that they should apply to that nation the same rule which, under this article, was to govern the others above-mentioned; and even extend it to captures made on the high seas, and brought into the American ports, if made by vessels which had been armed within them. In the constitutional arrangement of the different authorities of the American Federal Union, doubts were at first entertained whether it belonged to the executive government, or the judiciary department, to perform the duty of inquiring into captures made within the neutral territory, or by armed vessels originally equipped or the force of which had been augmented within the same, and of making restitution to the injured party. But it has been long since settled that this duty appropriately belongs to the federal tribunals acting as courts of admiralty and maritime jurisdiction (*x*).

§ 433. Limitations of the neutral jurisdiction

It has been judicially determined that this peculiar jurisdiction to inquire into the validity of captures made in violation of the neutral immunity, will be exercised only for

(*x*) Mr. Jefferson's Letter to M. Genet, Nov. 8, 1793. Waite's State Papers, vol. vi. p. 195. Opinion of the Attorney-General on the capture of the British ship *Grange*, May 14, 1793. Ibid. vol. i. p. 75. Mr. Jefferson's Letter to Mr. Hammond, Sept. 5, 1793. Waite's State Papers, vol. i. p. 165. Wheaton's Reports, vol. iv. p. 65, Note (*a*).

to restore in cases of illegal capture.

the purpose of restoring the specific property, when voluntarily brought within the territory, and does not extend to the infliction of vindictive damages, as in ordinary cases of maritime injuries. And it seems to be doubtful whether this jurisdiction will be exercised where the property has been once carried *infra præsidia* of the captor's country, and there regularly condemned in a competent Court of Prize. However this may be in cases where the property has come into the hands of a *bonâ fide* purchaser, without notice of the unlawfulness of the capture, it has been determined that the neutral court of admiralty will restore it to the original owner, where it is found in the hands of the captor himself, claiming under the sentence of condemnation. But the illegal equipment will not affect the validity of a capture, made after the cruise to which the outfit had been applied, is actually terminated (*y*).

§ 434. Right of asylum in neutral ports dependent on the consent of the neutral State.

An opinion is expressed by some text writers, that belligerent cruisers, not only are entitled to seek an asylum and hospitality in neutral ports, but have a right to bring in and sell their prizes within those ports. But there seems to be nothing in the established principles of public law which can prevent the neutral State from withholding the exercise of this privilege impartially from all the belligerent powers; or even from granting it to one of them, and refusing it to others, where stipulated by treaties existing previous to the war. The usage of nations, as testified in their marine ordinances, sufficiently shows that this is a rightful exercise of the sovereign authority which every State possesses, to regulate the police of its own sea-ports, and to preserve the public peace within its own territory. But the absence of a positive prohibition implies a permission to enter the neutral ports for these purposes (*z*).

§ 434a. Reception of belligerent

The reception or exclusion of belligerent cruisers and their prizes in neutral ports is a matter entirely at the discretion of the neutral government. When there are no prohibitions, or conditions of entry, belligerent

(*y*) *The Amistad de Rues*, 5 Wheaton, 385; *La Nereyda*, 8 ibid. 108; *The Fanny*, 9 ibid. 658; *The Arrogante Barcelones*, 7 ibid. 519; *The Santissima Trinidad*, ibid 283.

(*z*) Bynkershoek, Quæst. Jur. Pub. lib. i. cap. 15. Vattel, liv. iii. ch. 7, § 132. Valin, Comm. sur l'Ordonn. de la Marine, tom. ii. p. 272.

[Positive prohibitions are now the rule.]

ships of war are entitled to expect all the ordinary hospitalities of a friendly port. If the neutral government chooses to make regulations for the admission of ships into its ports, foreign ships must obey them. A neutral is, however, not required by the law of nations to make any such rules, or to place any restrictions upon the liberty which it accords of purchasing provisions, coal, and other supplies (not being arms or munitions of war). It is not a rule of international law that the supplies purchased should be limited to any particular quantity. So long as the neutral supplies both parties equally, neither have any right to complain (*a*). cruisers in neutral ports.

There is what constitutes a real exception to the rule that neutrals may not assist belligerent ships of war in carrying on their warlike operations. Although such ships of war may not purchase arms or ammunition, or recruit men, in the neutral port, yet they may be repaired and provisioned in it. This is in reality assisting the belligerent; for the cruiser in fact refits herself for war by repairing her engines, quite as much as by repairing her gun-carriages. But she is allowed to do the one and not the other (*b*). The reason for permitting her to be refitted seems to be, that unless this were allowed she might be unable to leave the neutral port. It would be inhuman to compel her to go to sea without provisions, or in an unseaworthy state; yet the neutral, in permitting her to enter his harbour, does not bargain that she shall remain there always, or at all events till the end of the war. **§ 434 b.** Repairs in neutral ports.

On the outbreak of a maritime war, neutral States generally make some rules on this subject. During the American civil war, England prohibited all ships of war and privateers of either party from using any port or waters subject to British jurisdiction, as a station or place of resort for any warlike purpose, or for obtaining any facilities of warlike equipment; and no vessel of war or privateer of one belligerent was to be permitted to leave any British port, from which any vessel of the other belligerent (whether a ship of war or a merchant vessel) should have previously departed, until twenty-four hours after the departure of the latter. Any ship of war or privateer of either belligerent entering British waters was to be required to depart within twenty-four hours, except in case of stress of weather, or of requiring repairs, or necessaries for the crew. As soon as she was repaired, or had obtained her necessary stores, she was to be required to depart forthwith. Nothing but provisions requisite for the subsistence of the crew, and so much coal as would carry the ship to the nearest port of her own country, or to some nearer destination, were to be supplied to ships of war or privateers; the coal only to be supplied once in three months to the same ship, unless this was relaxed by special permission (*c*). **§ 434 c.** English rules during American civil war.

A captor, who brought his prizes into British waters, was to be requested to depart and remove such prizes immediately. A vessel *bonâ fide* converted into a ship of war was, however, not to be deemed a **§ 434 d.** Prizes brought into British ports.

(*a*) [British counter-case at Geneva. Parl Papers, N. America, 1872 (No. 4), p. 13. Ortolan, Diplomatie de la Mer, vol. ii. p. 283.]
(*b*) [Montague Bernard, Neutrality of England, p. 400.]
(*c*) [Earl Russell to the Admiralty, &c. *London Gazette*, Dec. 15th, 1863.]

prize. In case of stress of weather, or other extreme and unavoidable necessity, the necessary time for removing the prize was to be allowed. If the prize was not removed by the prescribed time, or if the capture was made in violation of British jurisdiction, the prize was to be detained until Her Majesty's pleasure should be made known. Cargoes were to be subject to the same rules as prizes (*d*). A subsequent order provided that no ship of war of either belligerent should be allowed to remain in a British port for the purpose of being dismantled or sold (*e*).

§ 434e. Rules of other countries.

France prohibited all ships of war or privateers of either party from remaining in her ports with prizes for more than twenty-four hours, except in case of imminent perils of the sea. No prize goods were permitted to be sold in French territory (*f*). Prussia remained content with ordering her subjects not to engage in the equipment of privateers, and to obey the general rules of international law (*g*). The Belgian rule commanded all privateers to depart immediately, unless prevented by absolute necessity. The Dutch regulation was the same. Neither country made any provision as regards ships of war (*h*). In the subsequent wars between Brazil and Paraguay, and Spain and Chile, Holland prohibited ships of war or privateers with prizes, from entering or refitting in her harbours, unless overtaken by evident necessity. Ships of war without prizes might, however, remain an unlimited time in Dutch harbours, and provide themselves with an unlimited supply of coal, the Government reserving to themselves the right of limiting their stay to twenty-four hours, should this be deemed advisable. When ships of both parties were in any harbour at the same time, one was not to be allowed to depart until twenty-four hours after the other (*i*). There is thus no uniform rule on the subject to be derived from the practice of nations. Each State makes such regulations as it deems most advisable.

§ 434f. Prizes fitted out as ships of war.

Prizes are frequently armed and fitted out as vessels of war. After condemnation there is no doubt that the captors may so dispose of the prize; but if this is done before condemnation, although it infringes the owner's rights, it does not seem a settled point what view of the matter neutrals should take, as to admitting the ship into their ports. The neutral may inquire into the antecedents of the ship, and if she proves to be an uncondemned prize may detain her, if orders have been given that prizes are not to enter the neutral's ports (*k*), but it is uncertain whether the omission of this inquiry is a violation of neutrality, and will give any ground of complaint to the other belligerent. In 1863, the United States merchant-ship *Conrad* was captured by *The Alabama*. Her name was changed to *The Tuscaloosa*, and an officer and ten men, with two rifled twelve-pounder guns, were put on board, but her cargo of

The Tuscaloosa.

(*d*) [Circular to Governors of Colonies, 2nd June, 1864.]

(*e*) [*London Gazette*, 9th Sept. 1864. Similar rules were laid down during the Franco-German War, 1870. See Phillimore, vol. iii. § 168.]

(*f*) [Rep. Neutrality Laws Comm. 1868, p. 69.]

(*g*) [Ibid. p. 70.] (*h*) [Ibid. p. 70.] (*i*) [Ibid. p. 63.]

(*k*) [Opinion of Law Officers of the Crown. British Appendix to case at Geneva, vol. ii. p. 323.]

wool was not unshipped. She was then taken to the Cape of Good Hope, and the captain of *The Alabama* requested that she should be admitted into Simon's Bay as a tender of his vessel- in other words, as a ship of war. The Attorney-General of the colony gave it as his opinion that she had been sufficiently set forth as a vessel of war to justify the local authorities in admitting her as such, and that her real character could only be determined in the courts of the captor's country. She was, therefore, allowed to enter the port and obtain provisions. On the 26th December, 1863, *The Tuscaloosa* again put into Simon's Bay, and was this time seized by the local authorities. This, however, was considered unjustifiable by the Home Government. Whatever the character of the ship might have been during her first visit, she was treated as a ship of war, and was, therefore, entitled to expect the same treatment again, unless she received due warning that a different course would be pursued. Accordingly, orders were sent out to release and deliver her up to some Confederate officer, but as a matter of fact she never was delivered up to that government (*l*).

§ 435. Neutral impartiality, in what it consists.

Vattel states that the impartiality, which a neutral nation ought to observe between the belligerent parties, consists of two points.

1. To give no assistance where there is no previous stipulation to give it; nor voluntarily to furnish troops, arms, ammunition, or any thing of direct use in war. "I do not say *to give assistance equally*, but *to give no assistance:* for it would be absurd that a State should assist at the same time two enemies. And besides, it would be impossible to do it with equality: the same things, the like number of troops, the like quantity of arms, of munitions, &c., furnished under different circumstances, are no longer equivalent succours.

2. "In whatever does not relate to the war, the neutral must not refuse to one of the parties, merely because he is at war with the other, what she grants to that other" (*m*).

§ 436. Arming and equipping vessels, and enlisting men within the neutral territory, by either belligerent, unlawful.

These principles were appealed to by the American government, when its neutrality was attempted to be violated on the commencement of the European war, in 1793, by arming and equipping vessels, and enlisting men within the ports of the United States, by the respective belligerent powers, to cruise against each other. It was stated that if the neutral power might not, consistently with its neutrality, furnish men to either party for their aid in war, as little could either enrol them in the neutral territory. The authority both of Wolfius

(*l*) [Parl. Papers, 1873, N. America (No. 2), pp. 201—204.]
(*m*) Droit des Gens, liv. iii. ch. 7, § 104.

and Vattel was appealed to in order to show, that the levying of troops is an exclusive prerogative of sovereignty, which no foreign power can lawfully exercise within the territory of another State, without its express permission. The testimony of these and other writers on the law and usage of nations was sufficient to show, that the United States, in prohibiting all the belligerent powers from equipping, arming, and manning vessels of war in their ports, had exercised a right and a duty with justice and moderation. By their treaties with several of the belligerent powers, treaties forming part of the law of the land, they had established a state of peace with them. But without appealing to treaties, they were at peace with them all by the law of nature; for, by the natural law, man is at peace with man, till some aggression is committed, which by the same law authorizes one to destroy another, as his enemy. For the citizens of the United States, then, to commit murders and depredations on the members of other nations, or to combine to do it, appeared to the American government as much against the laws of the land as to murder or rob, or combine to murder or rob, their own citizens; and as much to require punishment, if done within their limits, where they had a territorial jurisdiction, or, on the high seas, where they had a personal jurisdiction, that is to say, one which reached their own citizens only; this being an appropriate part of each nation, on an element where each has a common jurisdiction (*n*).

§ 437. Prohibition enforced by American municipal statutes.

The same principles were afterwards incorporated in a law of Congress passed in 1794, and revised and re-enacted in 1818, by which it is declared to be a misdemeanor for any person, within the jurisdiction of the United States, to augment the force of any armed vessel, belonging to one foreign power at war with another power, with whom they are at peace; or to prepare any military expedition against the territories of any foreign nation with whom they are at peace; or to hire or enlist troops or seamen for foreign military or naval service; or to be concerned in fitting out any vessel, to cruise or commit hostilities in foreign service, against a nation at peace with them: and the vessel, in this

(*n*) Mr. Jefferson's Letter to M. Genet, June 17, 1793. American State Papers, vol. i. p. 155.

latter case, is made subject to forfeiture. The President is also authorized to employ force to compel any foreign vessel to depart, which by the law of nations or treaties ought not to remain within the United States, and to employ generally the public force in enforcing the duties of neutrality prescribed by the law (*o*).

§ 438. British Foreign Enlistment Act.

The example of America was soon followed by Great Britain, in the Act of Parliament 59 Geo. III. ch. 69, entitled, "An act to prevent the Enlisting or engagement of His Majesty's Subjects to serve in foreign Service, and the Fitting out or Equipping in His Majesty's Dominions Vessels for warlike purposes, without His Majesty's License." The previous statutes, 9 and 29 Geo. II., enacted for the purpose of preventing the formation of Jacobite armies in France and Spain, annexed capital punishment as for a felony, to the offence of entering the service of a foreign State. The 59 Geo. III. ch. 69, commonly called the Foreign Enlistment Act, provided a less severe punishment, and also supplied a defect in the former law, by introducing after the words "king, prince, state, or potentate," the words "colony or district assuming the powers of a government," in order to reach the case of those who entered the service of unacknowledged as well as of acknowledged States. The act also provided for preventing and punishing the offence of fitting out armed vessels, or supplying them with warlike stores, upon which the former law had been entirely silent.

§ 439. Debates on the Act of 1819.

In the debates which took place in Parliament upon the enactment of the last-mentioned act in 1819, and on the motion for its repeal in 1823, it was not denied by Sir J. Mackintosh and other members who opposed the bill, that the sovereign power of every State might interfere to prevent its subjects from engaging in the wars of other States, by which its own peace might be endangered, or its political and commercial interests affected. It was, however, insisted that the principles of neutrality only required the British legislature to maintain the laws in being, but could not command it to change any law, and least of all to alter the existing laws for the evident advantage of one of the belligerent

(*o*) Kent's Comm. on American Law, vol. i. p. 123, 5th ed.

parties. Those who assisted insurgent States, however meritorious the cause in which they were engaged, were in a much worse situation than those who assisted recognized governments, as they could not lawfully be reclaimed as prisoners of war, and might, as engaged in what was called rebellion, be treated as rebels. The proposed new law would go to alter the relative risks, and operate as a law of favour to one of the belligerent parties. To this argument it was replied by Mr. Canning, that when peace was concluded between Great Britain and Spain in 1814, an article was introduced into the treaty by which the former power stipulated not to furnish any succours to what were then denominated the revolted colonies of Spain. In process of time, as those colonies became more powerful, a question arose of a very difficult nature, to be decided on a due consideration of their *de jure* relation to Spain on the one hand, and their *de facto* independence on the other. The law of nations afforded no precise rule as to the course which, under circumstances so peculiar as the transition of colonies from their allegiance to the parent State, ought to be pursued by foreign powers. It was difficult to know how far the statute law or the common law was applicable to colonies so situated. It became necessary, therefore, in the Act of 1819, to treat the colonies as actually independent of Spain; and to prohibit mutually, and with respect to both, the aid which had been hitherto prohibited with respect to one only. It was in order to give full and impartial effect to the provisions of the treaty with Spain, which prohibited the exportation of arms and ammunition to the colonies, but did not prohibit their exportation to Spain, that the Act of Parliament declared that the prohibition should be mutual. When, however, from the tide of events flowing from the proceedings of the Congress of Verona, war became probable between France and Spain, it became necessary to review these relations. It was obvious that if war actually broke out, the British government must either extend to France the prohibition which already existed with respect to Spain, or remove from Spain the prohibition to which she was then subject, provided they meant to place the two countries on an equal footing. So far as the exportation of arms and ammunition was concerned, it was in the power of the crown to remove

any inequality between the belligerent parties, simply by an order in council. Such an order was consequently issued, and the prohibition of exporting arms and ammunition to Spain was removed. By this measure the British government offered a guaranty of their *bonâ fide* neutrality. The mere appearance of neutrality might have been preserved by the extension of the prohibition to France, instead of the removal of the prohibition from Spain; but it would have been a prohibition of words only, and not at all in fact; for the immediate vicinity of the Belgic ports to France would have rendered the prohibition of direct exportation to France totally nugatory. The repeal of the Act of 1819 would have, not the same, but a correspondent effect to that which would have been produced by an order in council prohibiting the exportation of arms and ammunition to France. It would be a repeal in words only as respects France, but in fact respecting Spain; and would occasion an inequality of operation in favour of Spain, inconsistent with an impartial neutrality. The example of the American government was referred to, as vindicating the justice and policy of preventing the subjects of a neutral country from enlisting in the service of any belligerent power, and of prohibiting the equipment in its ports of armaments in aid of such power. Such was the conduct of that government under the presidency of Washington, and the secretaryship of Jefferson; and such was more recently the conduct of the American legislature in revising their neutrality statutes in 1818, when the congress extended the provisions of the Act of 1794 to the case of such unacknowledged States as the South American colonies of Spain, which had not been provided for in the original law (*p*).

§ 439a. Neutrality laws.

The duties of neutral States as regards their supplying belligerents with ships and munitions of war have been brought into such prominence, and have been so thoroughly discussed in recent times, that it becomes necessary to enter more fully into the subject than Mr. Wheaton has done.

America.

America has the credit of being the first country that by positive legislation sought to restrain its subjects within the strict limits of

(*p*) Annual Register, vol. lxi. p. 71. Canning's Speeches, vol. iv. p. 150; vol. v. p. 34.

neutrality. It has been already shown (*q*) that, in 1793, France demanded from the United States certain exclusive privileges under the treaties of 1778, with respect to her privateers and ships of war, which the latter deemed inconsistent with the law of nations, and not warranted by the terms of the treaties. America was determined to remain neutral, and on the 22nd April, 1793, a Proclamation of Neutrality was issued, warning American citizens carefully to avoid all acts and proceedings which might tend to contravene the neutral disposition of their country. Any citizen who committed a breach of the law of nations would not be protected by his government (*r*). In spite of this a French agent, M. Guinet, landed at Charleston in April, commenced organizing a system of privateering, and endeavoured in various ways to stir up the inhabitants of the States to assist France (*s*). A French Prize Court was established at Charleston, and an English vessel, *The Grange*, was seized in the Delaware river. The British Minister in America, Mr. Hammond, remonstrated against these violations of neutrality, and on the 5th of June received an answer from Mr. Jefferson, admitting the justice of his remonstrance, and stating that measures would be taken to prevent such occurrences happening again (*t*). A collection of rules, declaring the original equipping and arming of vessels in the United States, by either belligerent for warlike purposes, to be unlawful, was drawn up, and issued to the collectors of customs. Violations of neutrality, however, continued. In October a French Vice-Consul at Boston, M. Duplaine, obtained the rescue by force of a vessel detained by the Marshal. The United States withdrew his exequatur, but the grand jury of Philadelphia refused to find a true bill against him (*u*). It was therefore deemed necessary to legislate on the subject, and accordingly the Act of the 5th of June, 1794, was passed (*x*). This Act was substantially the same as the one afterwards passed in 1818, and the latter, notwithstanding all that has since happened, still remains the law of America (*y*). The latter Act is set out in full in the Appendix. It will, however, be necessary to notice some of the leading American decisions on both the Acts, and on the general subject.

§ 439b. American cases.

U. S. v. Guinet (Les Jumeaux).

A prosecution for being concerned in fitting out and arming a privateer, was set on foot soon after the passing of the Act of 1794. *Les Jumeaux* was originally a British ship employed on the coast of Guinea. She entered Philadelphia in 1794 with a cargo of sugar and coffee, and at that time was owned entirely by French subjects. Originally she had ten portholes on each side, but only four altogether were open when she entered Philadelphia. While there her owners caused her to be repaired re-opened her twenty ports, and fitted her up as a ship of war. Orders were given by the United States' authorities that she should be dismantled of her extra armaments and reduced to the condition she was

(*q*) [See *ante*, § 425.]
(*r*) [American State Papers, vol. i. p. 140.]
(*s*) [Rep. Neutrality Commission, 1868, p. 18.]
(*t*) [Jefferson's Works, vol. iii. p. 571.]
(*u*) [Rep. Neutrality Comm. 1868, p. 23.]
(*x*) [United States Statutes at Large, Third Cong. Sess. I. ch. 50.]
(*y*) [United States Revised Statutes, Tit. Neutrality. See Appendix C.]

in when she first came. She thus quitted Philadelphia in her original condition, but lower down the river took on board some guns and a number of men. A pilot boat also attempted to convey some more war material to her, but was stopped by the local authorities. A militia force was then sent in pursuit of *Les Jumeaux*, but she avoided detention, partly by artifice and partly by threatening an armed resistance. One Guinet, who had been chiefly concerned in fitting her out, was then indicted for a breach of section 3 of the Act. The Judge ruled that the third section was meant to include all cases of vessels armed in American ports by one of the belligerent powers, to cruise against another belligerent power at peace with the United States. Converting a ship from her original destination with intent to commit hostilities; or, in other words, converting a merchant ship into a vessel of war, must be deemed an original outfit; for the Act would, otherwise, become nugatory and inoperative. It is the conversion from the peaceable use to the warlike purpose, that constitutes the offence. Guinet was found guilty (*z*).

§ 439c. French Prize Courts in America *The Betsy.* *Talbot* v. *Jansen.*

The claim of France to set up Courts of Prize in the United States was discussed in *The Betsy* (*a*), a vessel captured by a French privateer and sent into Baltimore for adjudication. The Supreme Court held that no foreign power could rightfully erect any court of judicature within the United States unless by force of a treaty, and that no foreign consul could adjudicate upon a prize. In 1795, one Ballard, a Virginian, obtained the assignment of a power to command a certain ship, given by the French Admiral in the United States, and authenticated by the French consul at Charleston. This ship, *L'ami de la Liberté*, was American owned, and was armed and equipped in the United States. Ballard renounced his Virginian citizenship, but was not naturalized elsewhere. He took command of *L'ami de la Liberté*, and sailing under the French flag, captured a Dutch brig *The Magdalena*, and brought her to Charleston for adjudication. The Court held that he was still an American citizen, and that the authority under which he sailed was invalid. That the capture of a vessel of a country at peace with the United States, made by a vessel fitted out in one of their ports, and commanded by one of their citizens, was illegal, and that if the captured vessel was brought within American jurisdiction, the District Courts, upon a libel for tortious seizure, might inquire into the facts, and decree restitution. Accordingly the ship was restored with damages (*b*). On the other hand, where a prize was made by a vessel which had left the United States with equipments partially adapted for war, but which were such as were frequently carried by merchantmen, and where her full equipment had been completed in French territory, the Court declined to restore the prize. It was held to be no violation of neutrality to sell such a ship to a foreigner (*c*). The Court also refused to restore a prize captured by a French privateer, which had been simply repaired in an American port, and had not augmented her force there (*d*). But

The Alfred.

(*z*) [*U. S.* v. *Guinet*, 2 Dallas, 328.]
(*a*) [1 Curtis, 74. S. C. 3 Dallas, 6.]
(*b*) [*Talbot* v. *Jansen*, *The Magdalena*, 1 Curtis, 128; S. C. 3 Dallas, 133.]
(*c*) [*Moodie* v. *The Alfred*, 1 Curtis, 234. S. C. 3 Dallas, 307.]
(*d*) [*Moodie* v. *The Phœbe Ann*, 1 Curtis, 237. S. C. 3 Dallas, 319.]

where a French privateer secretly increased her crew at New Orleans by taking on board several Americans, and then captured *The Alerta*, a Spanish brig, and sent her to New Orleans as a port of necessity, the Court restored the prize to her owner (*e*).

§ 439 d. Captures made without violation of neutrality.

Whenever it was proved that a capture was made *jure belli* on the high seas, by a duly commissioned vessel of war which had in no way violated American neutrality, the Courts refused to interpose. "It is no part of the duty of a neutral nation," said Chief Justice Story, "to interpose upon the mere footing of the law of nations, to settle all the rights and wrongs which may grow out of a capture between belligerents * * * The captors are amenable to their own government exclusively for any excess or irregularity in their proceedings" (*f*). This also was held to extend to the acts of privateers done under their war powers (*g*). Nor would the title by which a foreign sovereign owned a ship of war be inquired into (*h*). But it was firmly settled that if captures were made in violation of American neutrality, the property might be restored (even if there had been no Foreign Enlistment Act) if brought within the territory of the Union (*i*). Even after a regular condemnation in a Prize Court of the captor's country, the Court restored the prize, because she was still owned and controlled by the original wrong doer (*k*).

§ 439 e. What amounts to a violation of neutrality.

In order that a violation of neutrality should be committed, two elements were deemed necessary. In the first place the ship must have been wholly or in part equipped or manned, or she must have augmented her force within the jurisdiction of the United States. In the second place she must have been so equipped or manned with the intent that she should cruise against the commerce of a State at peace with the United States. Unless both the fact and the intent existed together, there was no offence against the law. The simple fact of an armed vessel having been equipped in, and sent from the United States to a belligerent did not of itself, necessarily constitute a breach of the Act, or of the law of nations (*l*). Thus, if a ship of war was built and fitted out in America, and was then *bonâ fide* sold, purely as a commercial speculation to a belligerent, there would be no intent that she should cruise against friendly commerce, and thus no breach of neutrality would be committed. Ships of war and arms are articles of commerce, and neutrals are entitled to continue their ordinary commerce with belligerents, subject to the risk of their goods being captured if they are contraband. No State prohibits its subjects from trading in contraband. It only leaves such goods to their fate, if either belligerent captures them on the way to the other. In 1828, *The Bolivar*, a vessel of 70 tons, sailed from Baltimore for St. Thomas, under the command of one Quincey, and

U. S. v. Quincey.

(*e*) [*The Alerta & Cargo* v. *Blas*, 3 Curtis, 379.]

(*f*) [*La Amistad de Rues*, 5 Wheaton, 385.]

(*g*) [*The Invincible*, 1 Wheaton, 238.]

(*h*) [*The Exchange*, 7 Cranch, 116. See *ante*, § 96, *et seq.*]

(*i*) [*The Grand Para*, 7 Wheaton, 471; 5 Curtis, 302; *La Concepcion*, 6 Wheaton, 235; *The Bello Corrunes*, 6 Wheaton, 152; *The Estrella*, 4 Wheaton, 298.]

(*k*) [*The Arrogante Barcelones*, 7 Wheaton, 496; *The Nereyda*, 8 Wheaton, 108].

(*l*) [*The Santissima Trinidad*, 7 Wheaton, 283.]

with Armstrong, her owner, on board. At St. Thomas, Armstrong fitted her out as a privateer to cruise under the Buenos Ayres flag against Brazil. Quincey continued to command her and made some prizes. He then returned to America, and was prosecuted for being concerned in fitting out *The Bolivar*. The Court held it to be not necessary in order to convict Quincey, that the jury should find, that *The Bolivar* was armed or in a condition to commit hostilities during the voyage from Baltimore to St. Thomas. But if the jury believed that the owner and quipper went to St. Thomas in search of funds, and without a present intention of employing her as a privateer, or even if they wished so to employ her, but the fulfilment of their wish depended on their being able to procure funds at St. Thomas for her equipment, the defendant Quincey was not guilty. "The offence," said the Court, "consists principally in the intention with which the preparations were made. These preparations, according to the very terms of the Act, must be made within the limits of the United States, and it is equally necessary that the intention with respect to the employment of the vessel should be formed before she leaves the United States. And this must be a fixed intention, not conditional or contingent, depending on some future arrangements * * * * The law does not prohibit armed vessels belonging to citizens of the United States from sailing out of our ports; it only requires the owner to give security that such vessels should not be employed by them to commit hostilities against foreign powers at peace with the United States" (*m*).

§ 439f. Whether fitting out *and* arming are necessary to constitute the offence.

The American Act declares that "if any person shall, within the limits of the United States, fit out *and* arm, or attempt to fit out *and* arm, or procure to be fitted out *and* armed," any vessel to cruise against the commerce of a friendly State, he shall be guilty of a misdemeanor. In 1866, *The Meteor*, a vessel alleged to be for the Chilian service in the war between Chili and Spain, was libelled in the District Court. She had been originally built for the Federal government, but the civil war having ended, she was sold instead to Chili. She was built to carry eleven or twelve guns, but these had not been mounted, and she was when libelled an unarmed ship of war. The counsel for the claimant contended that as she had not been fitted out *and* armed in the United States, she must be released. But the Court declined to adopt this interpretation of the statute, and judgment was given against the ship. This decision was not reviewed by the Supreme Court, and it has since been much questioned (*n*).

§ 439g. The President's powers.

The ninth section of the Act gives the President power to employ the land or naval forces of the Union to compel any foreign ship to depart. This has been held to be a power intended to be exercised only when, by the ordinary process or exercise of civil authority, the purposes of the law cannot be effected. It was not to be resorted to in cases where the seizure could be made by the ordinary civil means (*o*).

(*m*) [*U. S.* v. *Quincey*, 6 Peters, 445; 10 Curtis, 189. Rep. Neut. Comm. p. 29.]

(*n*) [Rep. of Neutrality Comm. p. 37. And see Parl. Papers, 1873 (No. 2), p. 39.]

(*o*) [*Hoyt* v. *Gelston*, 3 Wheaton, 246; S. C. 4 Curtis, 228.]

§ 439h. Enlisting.

With respect to enlisting, it has been held to be no crime under the Act to leave America with intent to enlist in foreign service, or to transport persons out of the country with their own consent, with an intention of such enlistment. To constitute an offence within the Act, such persons must be hired or retained in America to go abroad with an intention so to enlist (*p*).

§ 439i. Observance of American neutrality. Towards Spain.

Such was the law of the United States up to the Treaty of Washington, 1871. The next point is, to trace the manner in which it has been observed by American citizens. In 1806, a certain Miranda fitted out an expedition in New York, and sailed against Caracas. He was met by two Spanish men-of-war, and was defeated, and took refuge at Grenada; ten of his followers were condemned to death as pirates. Mr. Dana says, "There seems no doubt that this (expedition) might and ought to have been prevented by us" (*q*). In 1817, Don Luis de Onis, Spanish minister to the United States, began a series of complaints respecting the fitting out of American privateers to cruise against Spanish commerce. He referred to numerous instances of privateers issuing from Baltimore and New Orleans, or as he describes it, "whole squadrons of pirates having been fitted out from thence, in violation of the solemn treaty between the two nations, and bringing back to them the fruits of their piracies, without being checked in these courses" (*r*). On the 16th of January, he complains of a Spanish schooner being captured off Balize at little more than musket-shot from the land, by *The Jupiter*, a privateer fitted out in America. On the 10th of February, he refers to five more such privateers having taken Spanish prizes, and on several other occasions he addressed similar remonstrances to the American government (*s*). In their replies to these communications, the United States express their readiness to make inquiries into the matter, and refer the Spanish minister to the law courts. The correspondence closes with the following statement by Don Luis, written on the 16th of November, 1818:—"Whatever may be the forecast, wisdom, and justice conspicuous in the laws of the United States, it is universally notorious that a system of pillage and aggression has been organised in several parts of the Union against the vessels and property of the Spanish nation; and it is equally so that all the legal suits hitherto instituted by His Catholic Majesty's consuls, in the courts of their respective districts, for its prevention, or the recovery of the property, when brought into this country, have been and still are completely unavailing" (*t*). This letter was accompanied by a list of thirty privateers belonging to New Orleans, Charleston, Philadelphia, Baltimore, and New York, with a formidable list of prizes made by them.

(*p*) [*U. S.* v. *Kazinski*, 2 Sprague, 7; 8 Law Rep. 254. See on this subject, Wharton's Criminal Law, pp. 905—910. Opinions of Attorneys-General (U. S.), vol. vii. p. 367.]

(*q*) [Wheaton, by Dana, p. 558. Rep. of Neutrality Comm. p. 25.]

(*r*) [Reasons of Sir A. Cockburn as to Geneva Award. Parl. Papers, 1873 (No. 2), p. 54.]

(*s*) [Ibid. p. 55. See also, Appendix to British Case at Geneva, vol. iii. pp. 99—106.]

(*t*) [British Appendix, vol. iii. p. 131.]

The proceedings in the law courts failed in most cases from the impossibility of procuring evidence. Cruising against Spanish commerce was so profitable that few people would come forward and testify to the violations of the law. Nevertheless, it was enforced in the courts whenever evidence could be got, and numerous prizes taken by these privateers were restored to their owners (*u*). In the mean time Spanish commerce had suffered immensely. The dispute was finally adjusted by certain American claims on account of prizes made by French privateers, and condemned by French consuls in Spain, and other matters, being set off against the demands of Spain for reparation, in a treaty dated 22nd February, 1819 (*x*).

§ 439j. The expeditions of Lopez.

In 1849, Lopez, a Spanish adventurer, planned an attack on Cuba, with the object of annexing it to the United States. The President issued a proclamation calling upon every officer of the government to use every effort in his power to arrest any person concerned in this expedition. Nevertheless, Lopez left New Orleans on the 7th of May, 1850, in a steamer, accompanied by two other vessels, with about 500 men on board. He landed at Cardenas in Cuba, but was driven off by the Spanish troops, and escaped back to the United States. He was then arrested and brought to trial, but as the judge refused to allow delay to procure evidence, he was discharged amid the cheers of a large crowd; he was again prosecuted at New Orleans, in July, 1850, and a true bill was found against him, but the government failed to make out their case. On the 3rd of August, 1851, he again started from New Orleans, with an expedition of 400 men; this time he was overpowered by the Spaniards, and executed at Havana (*y*).

§ 439k. Other Cuban expeditions.

In 1869, Cuba again became the destination of hostile expeditions, organised in the Union. Mr. Fish, the American foreign secretary, admitted "with regret that an unlawful expedition did succeed in escaping from the United States, and landing on the shores of Cuba." In the following year, a notorious vessel, *The Hornet*, was permitted to leave New York for Cuba; she was seized several times before getting there by both British and American authorities, but finally managed to effect her purpose of landing an expedition in the island (*z*).

§ 439l. American neutrality as regards England.

England has on several occasions received annoyance from the formation of hostile Irish organizations in America. The first society for this purpose appeared in 1848, and was styled the "Irish Republican Union," but nothing definite was effected by it. This was succeeded in 1855 by another, named "The Massachusetts Irish Emigrant Aid Society," whose chief function appears to have been the establishment of secret societies in various parts of the States. But both the head society and its secret branches remained in obscurity and insignificance until 1863, when they came forth at Chicago as "The Fenian Brotherhood." At the second congress of the Brotherhood, in 1865, the Presi-

(*u*) [Wheaton, by Dana, p. 558. *The Santa Maria*, 7 Wheaton, 490; *The Monte Allegre*, ibid. 520; *U. S.* v. *Reyburn*, 6 Peters, 352.]

(*x*) [U. S. Statutes at Large, vol. viii. p. 258.]

(*y*) [Parl. Papers, 1873 (No. 2), pp. 62, 63. Rep. of Neutrality Comm. 1868, p. 34.]

(*z*) [British Counter-case at Geneva, p. 46.]

dent of the society declared that they were "virtually at war" with England (*a*); and, to give a greater air of reality to this announcement, bonds were issued, "redeemable six months after the acknowledgment of the independence of the Irish nation," the bonds being payable "on presentation at the treasury of the Irish Republic." It is believed that some of these bonds were taken up. About this time the Canadian government called out a few companies of militia to resist the threatened invasion of Canada by the Fenians, and if the language of the Brotherhood deserved any attention, precautions were highly necessary. Colonel Roberts, one of the ringleaders, promised "to have the green flag supported by the greatest army of Irishmen upon which the sun ever shone" (*b*). General Sweeney talked of the large amount of arms and war material they had purchased, and threw out mysterious hints respecting a certain territory they were about to conquer "from which we can not only emancipate Ireland, but also annihilate England" (*c*). These and other threats were announced at public meetings, and though the project was absurd on the face of it, it was nevertheless a hostile organization against a State at peace with the Union. Matters became more serious towards the middle of the year. About 800 or 900 armed men actually crossed into Canada, and drove back a small number of volunteers. They retreated before another Canadian detachment, and on recrossing the frontier were arrested and disarmed by the United States forces. About sixty-five were made prisoners in Canada, and placed in the common gaol. The most remarkable event in connection with this raid was that, on the 23rd July, the House of Representatives resolved to "request the President of the United States to urge upon the Canadian authorities, and also the British government, the release of the Fenian prisoners recently captured in Canada," and further, that the prosecutions against those taken in America should be abandoned. In pursuance of this, the prosecutions were dropped in America, and some of the ringleaders released after a day's detention on bonds of $5,000. In October the government decided to return some of the arms taken from the Fenians, and the remainder were returned the following year (*d*). In November, 1868, the Fenian leader, O'Neill, marched in review through Philadelphia with three regiments in Fenian uniform, numbering, as reported, 3,000 men. In 1870 two expeditions crossed into Canada, but being repulsed, fled across the frontier, and were again disarmed and their leaders imprisoned by the Union troops. Some of the leaders were fined and imprisoned, but were released two or three months after (*e*).

These violations of neutrality have been referred to (and others might be adduced) simply to show that America has not always prevented the formation of schemes in her territory hostile to States with whom she was at peace; and it is this that renders the tone adopted towards England by her representatives at the Geneva arbitration less

(*a*) [The *Irish American*, 11th Feb. 1865.]
(*b*) [*New York World*, 27th Jan. 1866.]
(*c*) [*New York World*, 20th Feb. 1866.]
(*d*) [British Counter-case, p. 43.]
(*e*) [Parl. Papers, N. America, 1873 (No. 2), p. 66.]

justifiable. In the truly touching language of Mr. Fish, "Laws will be broken at times; and happy is that form of government that can control the tendency of evil minds, and restrain, by its peaceful agencies, the violence of evil passions" (*f*). But it ill becomes a nation, whose laws have been frequently and flagrantly broken, to cast unworthy reproaches upon another State whose laws have also been violated, but in a much less degree, and whose good faith in endeavouring to preserve its neutrality was above suspicion.

§ 439 m. English neutrality laws.

The history of the law of England on the subject must next be considered. In 1721, on the occasion of a complaint being made by the Swedish minister that certain ships of war had been built in England and sold to the Czar, the Judges were ordered to attend the House of Lords and deliver their opinions on the question, whether the King of England had power to prohibit the building of ships of war, or of great force, for foreigners, and they answered that the king had no power to prohibit the same (*g*). The origin of the Foreign Enlistment Acts is given in the text (*h*). Up to the American civil war, the Act of 1819 had been occasionally invoked to prevent the enlistment and despatch of soldiers from the country as well as the equipment of ships, but the cases when it was put into force at all are very few (*i*).

§ 439 n. The Terceira affair.

In 1827, four vessels, under Count Saldanha, sailed from Plymouth, ostensibly for Brazil, but in reality to operate against Don Miguel in Terceira. H.M.S. *Walpole* and some gunboats were sent in pursuit, and intercepted them off Port Praya. Count Saldanha remonstrated against being interfered with, but the Captain of *The Walpole* courteously, though firmly, insisted upon conducting the expedition away, leaving it to the Count to go where he pleased so long as he did not stop at Terceira. Another expedition that had sailed from London was afterwards stopped by *The Walpole* (*k*). In 1835, the Foreign Enlistment Act was suspended, and British subjects were allowed to enlist in a Spanish Legion, under Sir De Lacy Evans, for the purpose of assisting the Queen of Spain. But this was done in pursuance of the Quadruple Alliance treaty, by which England agreed to assist the Queen of Spain (*l*). In 1846, three vessels preparing in British ports to sail against Equador, were seized and condemned. In 1867, a vessel alleged to be fitting out for the Portuguese rebels was seized, but released.

§ 439 o. Violations of British neutrality during American civil war.

A different class of cases arose with the American civil war, and these are the only ones of any material importance, at the present time. In these the ground of complaint was the fitting out of armed vessels for the Confederates in British ports. The depredations on American

(*f*) [Mr. Fish to Mr. Robarts, 13th Oct. 1869. Papers relating to Cuban Affairs, p. 138.]

(*g*) [Fortescue's Reports, p. 388. Parl. Papers, N. America, No. 4 (1872), p. 146.]

(*h*) [See *ante*, § 438].

(*i*) [They are collected in a memorandum, by Lord Tenterden, to the Neutrality Laws Commission Report, 1868, pp. 38, 39, the substance of which is given above.]

(*k*) [See Phillimore, iii. § 166.]

(*l*) [See *ante*, § 76.]

commerce caused by Confederate cruisers, some of which had been fitted out in violation of British neutrality, caused great irritation in the Union. A very prolonged discussion was entered into, with the view of making England pay for the damage done by those vessels, and the matter was finally referred to arbitration by the Treaty of Washington, 1871 (*m*). The causes of complaint put forward by the United States government are thus summarised by Lord Chief Justice Cockburn (*n*):—

Causes of complaint.

"1. That by reason of want of due diligence on the part of the British government vessels were allowed to be fitted out and equipped, in ports of the United Kingdom, in order to their being employed in making war against the United States, and having been so equipped, were allowed to quit such ports for that purpose.

"2. That vessels, fitted out and equipped for the before-mentioned purpose, in contravention of the Foreign Enlistment Act, and being therefore liable to seizure under the Act, having gone forth from British ports, but having afterwards returned to them, were not seized as they ought to have been, but having been allowed hospitality in such ports, were suffered to go forth again to resume their warfare against the commerce of the United States.

"3. That undue favour was shown in British ports to ships of war of the Confederate States, in respect of the time these ships were permitted to remain in such ports, or of the amount of coal with which they were permitted to be supplied.

"4. That vessels of the Confederate States were allowed to make British ports the base of naval operations against the ships and commerce of the United States."

§ 439p. Rules of the Treaty of Washington.

In order to assist the arbitrators in coming to a decision, three general rules were introduced into the treaty, and with these rules before them, the arbitrators were directed to determine as to each vessel "whether Great Britain has, by any act or omission, failed to fulfil any of the duties set forth in such rules, or recognised by the principles of international law not inconsistent with such rules." The rules were as follows:—

"A neutral government is bound—

"1st. To use due diligence to prevent the fitting out, arming, or equipping within its jurisdiction, of any vessel which it has reasonable ground to believe is intended to cruise or to carry on war against a power with which it is at peace; and also to use like diligence to prevent the departure from its jurisdiction of any vessel intended to cruise or carry on war as above, such vessel having been specially adapted in whole or in part within such jurisdiction, to warlike use.

"2nd. Not to permit or suffer either belligerent to make use of its ports or waters as the base of naval operations against the other, or for the purpose of the renewal or augmentation of military supplies or arms, or the recruitment of men.

"3rd. To exercise due diligence in its own ports and waters, and, as

(*m*) [See Appendix E., p. 688.]
(*n*) [Parl. Papers, 1873, N. America (No. 2), p. 7.]

to all persons within its jurisdiction, to prevent any violation of the foregoing obligations and duties" (*o*).

§ 439q. The rules as regards international law.

These rules are the weak point in the whole matter. It is stated in the treaty "that Her Majesty's government cannot assent to the foregoing rules as a statement of the principles of international law which were in force at the time when the claims mentioned in Article I. arose, but that Her Majesty's government, in order to evince its desire of strengthening the friendly relations between the two countries, and of making satisfactory provision for the future, agrees that, in deciding the questions between the two countries arising out of those claims, the arbitrators should assume that Her Majesty's government had undertaken to act upon the principles set forth in these rules. And the High Contracting Parties agree to observe these rules as between themselves in future, and to bring them to the knowledge of other maritime Powers, and to invite them to accede to them."

What does this amount to? Simply that England agreed that her liabilities should be judged of by rules which she admits were not in force at the time the acts she is charged with were done. It is useless to rake up a past quarrel, but it is much to be regretted that the noble spectacle of two great nations referring their disputes to a peaceful tribunal, should be marred by the tribunal being bound to act in a manner contrary to all the known principles of justice. To consent to be judged by *ex post facto* rules is a sacrifice which few care to make, and which when made is not likely to call forth imitation. Another fault of the treaty lay in its containing no definition of "due diligence," and thus the arbitrators were thrown upon general principles to ascribe a meaning to the term.

The chief cases heard by the arbitrators were as follows:—

§ 439r. *The Alabama.*

The Alabama, known at first as No. 290, was built at Liverpool, and was launched on the 15th May, 1862. She was beyond doubt intended as a vessel of war. On the 23rd June, Mr. Adams, American minister in England, wrote to Lord Russell that she was about to depart, and enter the service of the Confederates. On the 30th of June, the Law Officers of the Crown advised, "that if sufficient evidence can be obtained to justify proceedings under the Foreign Enlistment Act, such proceedings should be taken as early as possible." Up to the 15th of July, the Commissioners of Customs were of opinion that there was not sufficient evidence produced to justify the seizure of the vessel. On the other hand, Mr. (now Sir Robert) Collier advised on the 16th, that the vessel should be seized, and on the 23rd he gave another opinion to the same effect. Further evidence was then produced, and the opinion of the law officers was again asked, but owing to the illness of the Queen's Advocate, to whom the evidence was first sent, their opinion advising the detention of the vessel, was not made known till the 31st July, and on the 29th *The Alabama* sailed unarmed from Liverpool. On the following day, a tug left Liverpool with thirty or forty men on board, and these she transferred to *The Alabama* off Moelfra Bay. Two British vessels, *The Bahama* and *The Agrippina*, afterwards cleared from Liverpool and London with the armaments for *The Alabama*, and they joined

(*o*) [Treaty of Washington, 1871, art. vi. See Appendix E.]

her at the Azores, where she was fully equipped as a vessel of war. It must be added that the British authorities had no knowledge at the time of the connection between these vessels and *The Alabama* (*p*).

Upon these facts the arbitrators unanimously decided that Great Britain "failed to use due diligence," and that "after the escape of the vessel, the measures taken for its pursuit and arrest were so imperfect as to lead to no result, and therefore cannot be considered sufficient to release Great Britain from the responsibility already incurred." And a further ground for the decision was, that the ship "was on several occasions freely admitted into the ports of colonies of Great Britain, instead of being proceeded against as it ought to have been" (*q*).

§ 439 s. *The Florida.*

The facts relating to *The Florida* are not very dissimilar. She was built at Liverpool as a ship of war under the name of *The Oreto*, and she left Liverpool unarmed. The authorities thought she was built for the Italian government, and she cleared for Palermo and Jamaica in ballast. Representations as to her real destination were made to the government by the American consul at Liverpool, and by Mr. Adams, but as these were unaccompanied by what was deemed sufficient evidence for her seizure, she was allowed to go free. Even her crew were not aware of her real destination, and on her arrival at Nassau, most of them insisted on being discharged. After considerable discussion, she was seized at the Bahamas, and proceedings were taken in the Vice-Admiralty Court for her condemnation. She was however discharged, the judge being of opinion that, although she had been fitted out in British territory, yet, as she had shipped no munitions of war in the colony, and as there was no evidence that she had been transferred to a belligerent, he could not condemn her. In this he was mistaken. Fitted out, equipped, or armed, within British dominions, in contravention of the statute, a vessel becomes at once forfeited by the effect of the statute, and becomes liable to be condemned by proceedings *in rem*, taken before any competent court within whose jurisdiction she may be (*r*). *The Florida* (or *Oreto*) ought therefore to have been condemned at the Bahamas. On being released, she proceeded to Green Cay, a desert island sixty miles south of Nassau. In the meantime, her armaments had been made at Liverpool, but they were conveyed by train to Hartlepool, whence they were shipped, and at the time it was unknown in England that these armaments were intended for *The Florida*. It was thought they were simply contraband of war; however, they were shipped on board *The Prince Alfréd* at Hartlepool, and transferred to *The Florida* at Green Cay. At Nassau she had enlisted some men for her crew, but not having a full complement, she went to Cardenas, in Cuba, and endeavoured to enlist others there. This was prevented by the authorities, and she then sailed for the port of Mobile, which she contrived to enter by eluding the blockading cruisers. She remained at Mobile upwards of four months, and then issued as a Confederate ship of war; she was afterwards admitted into several British ports, and

(*p*) [See Argument of the United States. Parl. Papers, N. America, 1872 (No. 12), pp. 59—70, from which all the facts but the last have been taken.]

(*q*) [Parl. Papers, N. America, 1873 (No. 2), p. 3.]

(*r*) [Parl. Papers, N. America, 1873 (No. 2), p. 140.]

treated as a belligerent cruiser. With regard to this vessel, the tribunal by a majority of four to one, decided that England had failed in her duties in not preventing the ship leaving Liverpool, in allowing her to enlist men at Nassau, and to be armed at Green Cay, and in afterwards receiving her in British ports (*s*).

§ 439t. Summary of ships fitted out in England.

These two vessels, *The Alabama* and *The Florida*, were the only two vessels of war built in Great Britain for, and actually employed in, the service of the Confederates during the whole civil war. Four others were intended to be built and equipped, but were arrested while in the course of construction. Four merchant vessels, though not adapted for warlike purposes, were converted into vessels of war by having guns put on board, but out of the jurisdiction of the British government—two of them in Confederate ports—and this by reason of the impossibility of getting ships of war built owing to the active vigilance of the authorities (*t*). It is impossible from want of space to go into the details relating to the other ships; it was only as regards these two, *The Alabama* and *The Florida*, and their tenders, and partially as regards *The Shenandoah*, that the tribunal condemned England to pay the United States a sum of $15,500,000 in gold, as indemnity for the ravages committed on American commerce. Numerous other claims were put in by the United States, such as damages for the cost of pursuing the Southern cruisers, for the prospective earnings of the ships destroyed, and for the double loss incurred by the owners of the ships and also by their insurers, but these were rejected by the tribunal.

§ 439u. Indirect claims of the United States.

What are known as the indirect claims were dismissed by the arbitrators at the outset of the proceedings. They were for; (1) The enhanced rates of insurance in the United States, occasioned by the cruisers in question. (2) The transfer of the maritime commerce of the United States to England. This was a very sore point, but on no possible ground could England have been called upon to pay damages under such a head. (3) The prolongation of the civil war (*u*).

§ 439v. Royal Commission of 1868 on neutrality laws.

In 1868 a Royal Commission was appointed to inquire into the working of the Foreign Enlistment Act of 1819. This commission suggested several alterations in the law. They added in their report, "In making the foregoing recommendations we have not felt ourselves bound to consider whether we were exceeding what could actually be required by international law, but we are of opinion that if those recommendations should be adopted, the municipal law of this realm available for the enforcement of neutrality, will derive increased efficiency, and will, so far as we can see, have been brought into full conformity with your Majesty's international obligations" (*x*). In accordance with this report a new Foreign Enlistment Act was passed in 1870 (*y*).

§ 439w. Foreign Enlistment Act, 1870.

Very material changes were thus introduced, and the hands of the executive greatly strengthened. It is now an offence to build or cause to be built, or to equip or despatch, or to cause or allow to be despatched,

(*s*) [Parl. Papers, N. America, 1873 (No. 2), p. 3.] (*t*) [Ibid. p. 106.]
(*u*) [Argument of the United States. Parl. Papers, N. America (No. 12), 1872, p. 165.]
(*x*) [Report of Neutrality Laws Commission, 1868, p. 7.]
(*y*) [33 & 34 Vict. c. 90. See Appendix C., p. 662.]

any ship, with intent or knowledge, or having reasonable cause to believe that the same will be employed in the service of any foreign State at war with any friendly State (z). Thus, all question as to intent is now done away with. If the Secretary of State, or the chief executive authority in any place, is satisfied that there is reasonable and probable cause for believing a ship in Her Majesty's dominions is being built or equipped contrary to the Act, and is about to be taken beyond such dominions, they may seize and search the ship, and detain it until condemned or released by a court of law. The owner may apply to the Court of Admiralty for its release, but it is then incumbent on him to prove that the Act has not been contravened—a reversal of ordinary procedure which assumes a man innocent until he has been proved guilty (a). These are certainly great changes, but whether they are as great improvements is not so certain. The Act goes far beyond what international law requires. It creates a new crime—that of building—and makes British subjects liable to penalties for acts which are lawful by the law of nations, and by all other municipal laws. It places the shipbuilding trade of this country at a disadvantage, as compared with that of the rest of the world (b).

§ 439x. Cases under the Act, *The Gauntlet.*

The Act has been put in force several times since it was passed. During the Franco-German war, a French vessel of war captured a Prussian ship in the English Channel, and manned her with a prize crew. The prize was driven into the Downs by stress of weather, and while there, the French consul at Dover engaged a steam-tug to tow the prize to Dunkirk Roads. The tug did so, and on her return was proceeded against for a violation of the Act. The Privy Council (reversing the decision of the Admiralty Court) held, that towing the prize into French waters was despatching a ship within the meaning of section 8, and accordingly condemned the tug to the Crown (c). In another case during the same war, an English company contracted with the French government to lay down some telegraph lines on the French coast. They were to complete the communication between Dunkirk and Verdun. The company shipped the wires on to a specially constructed vessel, but when she was about to start the Secretary of State seized her. The ship was, however, released by the Admiralty Court, it being proved that the undertaking was of a purely commercial character, and that though France might partially use the lines for military purposes, this would not divest the transaction of its primary commercial character (d). It is an offence against the Act to supply a vessel to insurgents. Thus, a British vessel employed as a transport or store-ship in the service of the Cuban insurgents, who though not recognized as belligerents, had formed themselves into a body of people acting together, and undertaking and conducting hostilities, was condemned by the Privy Council, under the Act of 1819 (e).

The International.

The Salvador.

§ 439y. Enforcing municipal

There can be no doubt that the Act of 1870 is in excess of what

(z) [Section 8.]
(a) [Section 23.]
(b) [Report of Neutrality Laws Comm. pp. 9 and 10.]
(c) [*The Gauntlet*, L. R. 4 P. C. 184.]
(d) [*The International*, L. R. 3 A. & E. 321.]
(e) [*The Salvador*, L R. 3 P. C. 218. And see *Burton* v. *Pinkerton*, L. R. 2 Ex. 340.]

law when in excess of international law.

international law requires as the duty of a neutral. Thus the question arises whether a belligerent can claim, as of right, the putting in force of such a municipal law in his behalf, and make the omission to do so a ground of grievance. Lord Chief Justice Cockburn answers this as follows :—"When a government makes its municipal law more stringent than the obligations of international law would require, it does so, not for the benefit of foreign States, but for its own protection, lest the acts of its subjects in overstepping the confines, oftentimes doubtful, of strict right, in transactions of which a few circumstances, more or less, may alter the character, should compromise its relations with other nations . . . . . Now it is quite clear that the obligations of the neutral State spring out of, and are determined by, the principles and rules of international law, independently of the municipal law of the neutral. They would exist exactly the same, though the neutral State had no municipal law to enable it to enforce the duties of neutrality on its subjects. It would obviously afford no answer on the part of a neutral government to a complaint of a belligerent of an infraction of neutrality that its municipal law was insufficient to enable it to insure the observance of neutrality by its subjects; the reason being that international law, not the municipal law of the particular country, gives the only measure of international rights and obligations. While, therefore, on the one hand, the municipal law, if not co-extensive with the international law, will afford no excuse to the neutral, so neither on the other, if in excess of what international obligations exact, will it afford any right to the belligerent which international law would fail to give him" (*f*). Both belligerents must of course be treated equally in this respect. Partiality towards one will give the other a ground of complaint.

§ 439a Sale of ships of war by neutrals to belligerents.

The question arises, has there been any change effected in the general principles of international law respecting the duties of neutrals? England and America by agreeing to act in future on the three rules of the Treaty of Washington, have added to their duties as neutrals. But owing to a difference of opinion between these two countries as to the interpretation of these rules, foreign States have not been invited to accede to them (*g*). Therefore, as regards other States, the general principles of international law remain the same. A neutral government is bound not to assist a belligerent in any way. On the other hand, the subjects of the neutral are entitled to continue their ordinary trade, and when that trade consists in exporting arms, or ships of war, there arises a conflict between the rights of a belligerent and the rights of neutral subjects. A government may not in any case sell munitions of war to a belligerent, but its subjects may, provided they sell indifferently to both parties in the war, and provided the transaction is a purely commercial one, and not done with the intent of assisting in the war, *animo adjuvadi*, but simply for purposes of gain. The right which

(*f*) [Reasons for dissenting from Geneva Award. Parl. Papers, N. America, 1873 (No. 2), p. 29.]

(*g*) [Papers presented to Parliament, 17th July, 1874 (No. 1012). Hansard, vol. ccxviii. p. 1839.]

war gives to a belligerent is that of seizing such goods as contraband, when on their way from the neutral State to his adversary. This is undoubtedly an encroachment on the neutral's right of trade in favour of belligerents, but it is firmly settled, and could hardly be avoided in the nature of things. Now ships intended for war, whether armed or not, are clearly contraband, and the difficulty of distinguishing between the *bonâ fide* sale of a ship of war, and the organizing of a hostile expedition in her territory, has induced England to prohibit altogether the sale of such ships by her subjects to belligerents. But this is not prohibited by international law when done *bonâ fide*. "There is nothing in our laws," said Mr. Justice Story, in 1822, "or in the law of nations, that forbids our citizens from sending armed vessels, as well as munitions of war to foreign ports for sale. It is a commercial adventure which no nation is bound to prohibit, and which only exposes the person engaged in it to the penalty of confiscation" (*h*). Thus England has bound herself to observe a rule not required by international law, and as she is still the greatest shipbuilding country in the world, this is a sacrifice of her rights in favour of States at war, which ought to remove all doubts as to her sincerity in wishing to fulfil her neutral obligations.

§ 439aa. Distinction between commercial and hostile operations.

It is impossible to lay down any hard and fast line separating commercial transactions in munitions of war, and the organising of hostile expeditions. International law is necessarily incapable of being defined and laid down with the precision attainable by municipal law. The question is one of intent, and it is the duty of a neutral government to exercise due diligence in ascertaining what the real character of the transaction may be. The elements of a hostile expedition are thus described by Professor Bernard "If at the time of its departure there be the means of doing any act of war,—if those means, or any of them, have been procured and put together in the neutral port,—and if there be the intention to use them (which may always be taken for granted when they are in the hands of the belligerents), the neutral port may be justly said to serve as a base or point of departure for a hostile expedition" (*i*).

§ 439bb. Due diligence necessary.

A government is not responsible for every possible hostile act that may take place in its territory. So long as it takes all reasonable precautions to prevent hostile acts, and exercises due diligence in enforcing these precautions, a belligerent has no just ground of complaint, even if its neutrality is violated. The difficulty is to ascertain what constitutes "due diligence." "The maximum of precaution," says M. Tetens, "in this case, is to maintain and enforce the observance of neutrality in vessels and cargoes, with the same diligence and exactness as are exercised in inquiries and other proceedings relative to taxes, or imposts and customs. He who does as much to prevent a wrong meditated against another, as he does for his own protection, satisfies every just and easonable expectation on the part of that other" (*k*). It is advisable

(*h*) [*The Santissima Trinidad*, 7 Wheaton, 340.]
(*i*) [Montague Bernard, Neutrality of Great Britain, p. 399.]
(*k*) [See Reddie's Researches in Maritime and International Law, vol. ii p. 203.]

during war for a neutral to make special regulations for his subjects, but this cannot be demanded by a belligerent as a matter of right. All he can demand is, that the neutral, by whatever means he thinks proper, should, *bonâ fide*, do his best to prevent violations of his neutrality.

§ 440. Immunity of the neutral territory, how far it extends to neutral vessels on the high seas.

The unlawfulness of belligerent captures, made within the territorial jurisdiction of a neutral State, is incontestably established on principle, usage, and authority. Does this immunity of the neutral territory from the exercise of acts of hostility within its limits, extend to the vessels of the nation on the high seas, and without the jurisdiction of any other State?

We have already seen, that both the public and private vessels of every independent nation on the high seas, and without the territorial limits of any other State, are subject to the municipal jurisdiction of the State to which they belong (*l*). This jurisdiction is exclusive, only so far as respects offences against the municipal laws of the State to which the vessel belongs. It excludes the exercise of the jurisdiction of every other State under its municipal laws, but it does not exclude the exercise of the jurisdiction of other nations, as to crimes under international law; such as piracy, and other offences, which all nations have an equal right to judge and to punish. Does it, then, exclude the exercise of the belligerent right of capturing enemy's property?

This right of capture is confessedly such a right as may be exercised within the territory of the belligerent State, within the enemy's territory, or in a place belonging to no one; in short, in any place except the territory of a neutral State. Is the vessel of a neutral nation on the high seas such a place?

§ 441. Distinction between public and private vessels.

A distinction has been here taken between the public and the private vessels of a nation. In respect to its *public* vessels, it is universally admitted, that neither the right of visitation and search, of capture, nor any other belligerent right, can be exercised on board such a vessel on the high seas. A public vessel, belonging to an independent sovereign, is exempt from every species of visitation and search, even within the terri-

(*l*) *Vide ante*, Pt. II. ch. 2, §§ 106, 107.

torial jurisdiction of another State; *à fortiori*, must it be exempt from the exercise of belligerent rights on the ocean, which belongs exclusively to no one nation (*m*).

In respect to *private* vessels, it has been said the case is different. They form no part of the neutral territory, and, when within the territory of another State, are not exempt from the local jurisdiction. That portion of the ocean which is temporarily occupied by them forms no part of the neutral territory; nor does the vessel itself, which is a moveable thing, the property of private individuals, form any part of the territory of that power to whose subjects it belongs. The jurisdiction which that power may lawfully exercise over the vessel on the high seas, is a jurisdiction over the persons and property of its citizens; it is not a territorial jurisdiction. Being upon the ocean, it is a place where no particular nation has jurisdiction; and where, consequently, all nations may equally exercise their international rights (*n*).

§ 442. Usage of nations subjecting enemy's goods in neutral vessels to capture.

Whatever may be the true original abstract principle of natural law on this subject, it is undeniable that the constant usage and practice of belligerent nations, from the earliest times, have subjected enemy's goods in neutral vessels to capture and condemnation, as prize of war. This constant and universal usage has only been interrupted by treaty stipulations, forming a temporary conventional law between the parties to such stipulations (*o*).

§ 443. Neutral vessels laden with enemy's goods subject to confiscation by the ordinances of some States.

The regulations and practice of certain maritime nations, at different periods, have not only considered the *goods* of an enemy, laden in the ships of a friend, liable to capture, but have doomed to confiscation the neutral *vessel* on board of which these goods were laden. This practice has been sought to be justified, upon a supposed analogy with that provision of the Roman law, which involved the vehicle of prohibited

(*m*) *Vide ante*, Pt. II. ch. 2, §§ 105—107.

(*n*) Rutherforth's Inst. vol. ii. b. ii. ch. 9, § 19. Azuni, Diritto Maritimo, Pt. II. ch. 3, art. 2. Letter of American Envoys at Paris to M. de Talleyrand, January, 1798. Waite's American State Papers, vol. iv. p. 34.

(*o*) Consolato del Mare, cap. 273. Wheaton's Hist. Law of Nations, pp. 65, 115—119, 200—206. Albericus Gentilis, Hisp. Advoc. lib. i. cap. 27. Grotius, de Jur. Bel. ac Pac. lib. iii. cap. 6, §§ 6, 26; cap. 1, § 5, Note 6. Bynkershoek, Quæst. Jur. Pub. lib. i. cap. 14. Vattel, Droit des Gens, liv. iii. ch. 7, § 115. Heineccius, de Nav. ob vect. cap. 2, § 9. Locconius, de Jure. Marit. lib. ii. cap. 4, § 12. Azuni, Diritto Marit. Pt. II. ch. 3, art. 1, 2.

commodities in the confiscation pronounced against the prohibited goods themselves (*p*).

Thus, by the marine ordinance of Louis XIV., of 1681, all vessels laden with enemy's goods are declared lawful prize of war. The contrary rule had been adopted by the preceding prize ordinances of France, and was again revived by the *règlement* of 1744, by which it was declared, that "in case there should be found on board of neutral vessels, of whatever nation, goods or effects belonging to his Majesty's enemies, the goods or effects shall be good prize, and the vessel shall be restored." Valin, in his commentary upon the ordinance, admits that the more rigid rule, which continued to prevail in the French prize tribunals from 1681 to 1744, was peculiar to the jurisprudence of France and Spain; but that the usage of other nations was only to confiscate the goods of the enemy (*q*).

§ 444. Goods of a friend on board the ships of an enemy, liable to confiscation by the prize codes of some nations.

Although by the general usage of nations, independently of treaty stipulations, the goods of an enemy, found on board the ships of a friend, are liable to capture and condemnation, yet the converse rule, which subjects to confiscation the goods of a friend, on board the vessels of an enemy, is manifestly contrary to reason and justice. It may, indeed, afford, as Grotius has stated, a presumption that the goods are enemy's property; but it is such a presumption as will readily yield to contrary proof, and not of that class of presumptions which the civilians call *presumptiones juris et de jure*, and which are conclusive upon the party.

But however unreasonable and unjust this maxim may be, it has been incorporated into the prize codes of certain nations, and enforced by them at different periods. Thus, by the French ordinances of 1538, 1543, and 1584, the goods of a friend, laden on board the ships of an enemy, are declared good and lawful prize. The contrary was provided by the subsequent declaration of 1650; but by the marine ordinance of Louis XIV., of 1681, the former rule was again established. Valin and Pothier are able to find no better argument in support of this rule, than that those who lade their goods on

(*p*) Barbeyrac, Note to Grotius, lib. iii. cap. 6, § 6, Note 1.
(*q*) Valin, Comm. liv. iii. tit. 9. Des. Prises, art. 7. Wheaton's Hist. Law of Nations, pp. 111—114.

board an enemy's vessels thereby favour the commerce of the enemy, and by this act are considered in law as submitting themselves to abide the fate of the vessel; and Valin asks, "How can it be that the goods of friends and allies, found in an enemy's ship, should not be liable to confiscation, whilst even those of subjects are liable to it?" To which Pothier himself furnishes the proper answer: that, in respect to goods, the property of the king's subjects, in lading them on board an enemy's vessels they contravene the law which interdicts to them all commercial intercourse with the enemy, and deserve to lose their goods for this violation of the law (*h*).

The fallacy of the argument by which this rule is attempted to be supported, consists in assuming, what requires to be proved, that, by the act of lading his goods on board an enemy's vessel, the neutral submits himself to abide the fate of the vessel; for it cannot be pretended that the goods are subjected to capture and confiscation *ex re*, since their character of neutral property exempts them from this liability. Nor can it be shown that they are thus liable *ex delicto*, unless it be first proved that the act of lading them on board is an offence against the law of nations. It is therefore with reason that Bynkershoek concludes that this rule, where merely established by the prize ordinances of a belligerent power, cannot be defended on sound principles. Where, indeed, it is made by special compact the equivalent for the converse maxim, that *free ships make free goods*, this relaxation of belligerent pretensions may be fairly coupled with a correspondent concession by the neutral, that *enemy ships should make enemy goods*. These two maxims have been, in fact, commonly thus coupled in the various treaties on this subject, with a view to simplify the judicial inquiries into the proprietary interest of the ship and cargo, by resolving them into the mere question of the national character of the ship.

§ 445. The two maxims, of *free ships free goods* and *enemy*

The two maxims are not, however, inseparable. The primitive law, independently of international compact, rests on the simple principle, that war gives a right to capture the goods of an enemy, but gives no right to capture the goods of a

(*h*) Valin, Comm. liv. iii. tit. 9. Des Prises, art. 7. Pothier, Traité de Propriété, No. 96.

ships enemy goods, not necessarily connected.

friend. The right to capture an enemy's property has no limit but of the *place* where the goods are found, which, if neutral, will protect them from capture. We have already seen that a neutral vessel on the high seas is not such a place. The exemption of neutral property from capture has no other exceptions than those arising from the carrying of contraband, breach of blockade, and other analogous cases, where the conduct of the neutral gives to the belligerent a right to treat his property as enemy's property. The neutral flag constitutes no protection to an enemy's property, and the belligerent flag communicates no hostile character to neutral property. States have changed this simple and natural principle of the law of nations, by mutual compact, in whole or in part, according as they believed it to be for their interest; but the one maxim, that *free ships make free goods,* does not necessarily imply the converse proposition, that *enemy ships make enemy goods.* The stipulation, that neutral bottoms shall make neutral goods, is a concession made by the belligerent to the neutral, and gives to the neutral flag a capacity not given to it by the primitive law of nations. On the other hand, the stipulation subjecting neutral property, found in the vessel of an enemy, to confiscation as prize of war, is a concession made by the neutral to the belligerent, and takes from the neutral a privilege he possessed under the pre-existing law of nations; but neither reason nor usage renders the two concessions so indissoluble, that the one cannot exist without the other.

It was upon these grounds that the Supreme Court of the United States determined that the Treaty of 1795, between them and Spain, which stipulated that free ships should make free goods, did not necessarily imply the converse proposition, that enemy ships should make enemy goods, the treaty being silent as to the latter; and that, consequently, the goods of a Spanish subject, found on board the vessel of an enemy of the United States, were not liable to confiscation as prize of war. And although it was alleged, that the prize law of Spain would subject the property of American citizens to condemnation, when found on board the vessels of her enemy, the court refused to condemn Spanish property found on board a vessel of their enemy, upon the principle of reciprocity; because the American government had not manifested its will to retaliate

upon Spain; and until this will was manifested by some legislative act, the court was bound by the general law of nations constituting a part of the law of the land (*i*).

§ 446. Conventional law as to *free ships free goods.*

The conventional law, in respect to the rule now in question, has fluctuated at different periods, according to the fluctuating policy and interests of the different maritime States of Europe. It has been much more flexible than the consuetudinary law; but there is a great preponderance of modern treaties in favour of the maxin, *free ships free goods*, sometimes, but not always, connected with the correlative maxim, *enemy ships enemy goods;* so that it may be said that, for two centuries past, there has been a constant tendency to establish, by compact, the principle, that the neutrality of the ship should exempt the cargo, even if enemy's property, from capture and confiscation as prize of war. The capitulation granted by the Ottoman Porte to Henry IV. of France, in 1604, has commonly been supposed to form the earliest example of a relaxation of the primitive rule of the maritime law of nations, as recognized by the Consolato del Mare, by which the goods of an enemy, found on board the ships of a friend, were liable to capture and confiscation as prize of war. But a more careful examination of this instrument will show, that it was not a reciprocal compact between France and Turkey, intended to establish the more liberal maxim of *free ships free goods;* but was a gratuitous concession, on the part of the Sultan, of a special privilege, by which the goods of French subjects laden on board the vessels of his enemies, and the goods of his enemies laden on board French vessels, were both exempted from capture by Turkish cruisers. The capitulation expressly declares, art. 10:—"Parceque des sujets de la France naviguent sur vaisseaux appartenans à nos ennemis, et les chargent de leurs marchandises, et étant rencontrés, ils sont faits le plus souvent esclaves, et leurs marchandises prises; pour cette cause, nous commandons et voulons qu'à l'avenir, ils ne puissent être pris sous ce prétexte, ni leurs facultés confisquées, à moins qu'ils ne soient trouvés sur vaisseaux en course," etc. Art. 12:—"Que les marchandises qui séront chargées sur vaisseaux Français appartenantes aux ennemis de notre Porte,

(*i*) *The Nereide*, 9 Cranch, 388.

ne puissent être prises sous couleur qu'ils sont de nos dits ennemis, puisque ainsi est nôtre vouloir" (*k*).

§ 447. Treaties of Holland on this subject.

It became, at an early period, an object of interest with Holland, a great commercial and navigating country, whose permanent policy was essentially pacific, to obtain a relaxation of the severe rules which had been previously observed in maritime warfare. The States-General of the United Provinces having complained of the provisions in the French ordinance of Henry II., 1538, a treaty of commerce was concluded between France and the Republic, in 1646, by which the operation of the ordinance, so far as respected the capture and confiscation of neutral vessels for carrying enemy's property, was suspended; but it was found impossible to obtain any relaxation as to the liability to capture of enemy's property in neutral vessels. The Dutch negotiator in Paris, in his correspondence with the grand pensionary De Witt, states that he had obtained the "repeal of the pretended French law, *que robe d'ennemi confisque celle d'ami;* so that if, for the future, there should be found in a free Dutch vessel effects belonging to the enemies of France, these effects alone will be confiscable, and the ship with the other goods will be restored; for it is impossible to obtain the twenty-fourth article of my Instructions, where it is said that the freedom of the ship ought to free the cargo, even if belonging to an enemy." This latter concession the United Provinces obtained from Spain by the treaty of 1650; from France by the treaty of alliance of 1662; and by the commercial treaty signed at the same time with the peace at Nimiguen in 1678, confirmed by the treaty of Ryswick in 1697. The same stipulation was continued in the treaty of the Pyrénées between France and Spain, in 1659.

(*k*) Flassan, Histoire de la Diplomatie Française, tom. ii. p. 226. M. Flassan observes:—"C'est a tort qu'on a donné à ces Capitulations le nom de *traité*, lequel suppose deux parties contractantes, stipulans sur leurs intérêts; ici on ne trouve que des concessions de privelèges, et des exemptions de pure libéralité faites par la Porte à la France." In the first English edition of this work, and also in another more recently published, under the title of "History of the Law of Nations," the author has been misled, by following the authority of Azuni and other compilers, into the erroneous conclusion, that the above capitulation was intended to change the primitive law, as observed among the maritime States of the Mediterranean from the earliest times, and to substitute a more liberal rule for that of the Consolato del Mare, of which the Turks must necessarily be supposed to have been ignorant, and which the French king did not stipulate to relax in their favour, where the goods of his enemies should be found on board Turkish vessels.

The rule of *free ships free goods* was coupled, in these treaties, with its correlative maxim, *enemy ships enemy goods*. The same concession was obtained by Holland from England, in 1668 and 1674, as the price of an alliance between the two countries against the ambitious designs of Louis XIV. These treaties gave rise, in the war which commenced in 1756 between France and Great Britain, to a very remarkable controversy between the British and Dutch governments, in which it was contended, on the one side, that Great Britain had violated the rights of neutral commerce, and on the other, that the States-General had not fulfilled the guaranty which constituted the equivalent for the concession made to the neutral flag, in derogation of the pre-existing law of nations (*l*).

§ 448. Portuguese treaty.

A treaty of commerce and navigation was concluded between the Republic of England and the King of Portugal in 1654, by which the principle of *free ships free goods*, coupled with the correlative maxim of *enemy ships enemy goods*, was adopted between the contracting parties. This stipulation continued to form the conventional law between the two nations, also closely connected by political alliance, until the revision of this treaty in 1810, when the stipulation in question was omitted, and has never since been renewed.

§ 449. Union of the two maxims in treaties.

The principle that the character of the vessel should determine that of the cargo, was adopted by the treaties of Utrecht of 1713, subsequently confirmed by those of 1721 and 1739, between Great Britain and Spain, by the treaty of Aix-la-Chapelle, in 1748, and of Paris in 1763, between Great Britain, France, and Spain (*m*).

§ 450. Armed neutrality of 1780.

Such was the state of the consuetudinary and conventional law prevailing among the principal maritime powers of Europe, when the declaration of independence by the British North American colonies, now constituting the United States, gave rise to a maritime war between France and Great Britain.

(*l*) Dumont, Corps Diplomatique, tom. vi. pt. i. p. 342. Flassan, Histoire de la Diplomatie Française, tom. iii. p. 451. A pamphlet was published on the occasion of this controversy between the British and Dutch governments, by the elder Lord Liverpool, (then Mr. Jenkinson,) entitled, "A Discourse on the Conduct of Great Britain in respect to Neutral Nations during the present War," which contains a very full and instructive discussion of the question of neutral navigation, both as resting on the primitive law of nations and on treaties. London, 8vo. 1757. 2nd ed. 1794; 3rd ed. 1801.

(*m*) Wheaton's Hist. Law of Nations, pp. 120—125.

With a view to conciliate those powers which remained neutral in this war, the cabinet of Versailles issued, on the 26th of July, 1778, an ordinance or instruction to the French cruisers, prohibiting the capture of neutral vessels, even when bound to or from enemy ports, unless laden in whole or in part with contraband articles destined for the enemy's use; reserving the right to revoke this concession, unless the enemy should adopt a reciprocal measure within six months. The British government, far from adopting any such measure, issued in March, 1780, an order in council suspending the special stipulations respecting neutral commerce and navigation contained in the treaty of alliance of 1674, between Great Britain and the United Provinces upon the alleged ground that the States-General had refused to fulfil the reciprocal conditions of the treaty. Immediately after this order in council, the Empress Catharine II. of Russia communicated to the different belligerent and neutral powers the famous declaration of neutrality, the principles of which were acceded to by France, Spain, and the United States of America, as belligerent; and by Denmark, Sweden, Prussia, Holland, the Emperor of Germany, Portugal, and Naples, as neutral powers. By this declaration, which afterwards became the basis of the armed neutrality of the Baltic powers, the rule that free ships make free goods was adopted, without the previously associated maxim that enemy ships should make enemy goods. The Court of London answered this declaration by appealing to the "principles generally acknowledged as the law of nations, being the only law between powers where no treaties subsist;" and to the "tenor of its different engagements with other powers, where those engagements had altered the primitive law by mutual stipulations, according to the will and convenience of the contracting parties." Circumstances rendered it convenient for the British government to dissemble its resentment towards Russia, and the other northern powers, and the war was terminated without any formal adjustment of this dispute between Great Britain, and the other members of the armed neutrality (*n*).

(*n*) Flassan, Diplomatie Française, tom. vii. pp. 183, 273. Annual Register, vol. xxiii. p. 205, State Papers, pp. 345—356; vol. xxiv. p. 300. Wheaton's Hist. Law of Nations, pp. 294—305.

§ 451. Treaties uniting the maxims not renewed.

By the treaties of peace concluded at Versailles in 1783, between Great Britain, France, and Spain, the treaties of Utrecht were once more revived and confirmed. This confirmation was again reiterated in the commercial treaty of 1786, between France and Great Britain, by which the two kindred maxims were once more associated. In the negotiations at Lisle in 1797, it was proposed by the British plenipotentiary, Lord Malmesbury, to renew all the former treaties between the two countries confirmatory of those of Utrecht. This proposition was objected to by the French ministers, for several reasons foreign to the present subject; to which Lord Malmesbury replied that these treaties were become the law of nations, and that infinite confusion would result from their not being renewed. It is probable, however, that his lordship meant to refer to the territorial arrangements rather than to the commercial stipulations contained in these treaties. Be this as it may, the fact is, that they were not renewed, either by the treaty of Amiens in 1802, or by that of Paris in 1814.

§ 452. Practice during the French Revolution.

During the protracted wars of the French Revolution all the belligerent powers began by discarding in practice, not only the principles of the armed neutrality, but even the generally received maxims of international law, by which the rights of neutral commerce in time of war had been previously regulated. "Russia," says Von Martens, "made common cause with Great Britain and with Prussia, to induce Denmark and Sweden to renounce all intercourse with France, and especially to prohibit their carrying goods to that country. The incompatibility of this pretension with the principles established by Russia in 1780, was veiled by the pretext, that in a war like that against revolutionary France, the rights of neutrality did not come in question." France, on her part, revived the severity of her ancient prize code, by decreeing, not only the capture and condemnation of the goods of her enemies found on board neutral vessels, but even of the vessels themselves laden with goods of British growth, produce, and manufacture.

§ 453. Armed neutrality of 1800.

But in the further progress of the war, the principles which had formed the basis of the armed neutrality of the northern powers in 1780, were revived by a new maritime confederacy between Russia, Denmark, and Sweden, formed in 1800, to which Prussia acceded. This league was soon dissolved by

the naval power of Great Britain and the death of the Emperor Paul; and the principle now in question was expressly relinquished by Russia in the convention signed at St. Petersburg in 1801, between that power and the British Government, and subsequently acceded to by Denmark and Sweden. In 1807, in consequence of the stipulations contained in the treaty of Tilsit between Russia and France, a declaration was issued by the Russian Court, in which the principles of the armed neutrality were proclaimed anew, and the convention of 1801 was annulled by the Emperor Alexander. In 1812, a treaty of alliance against France was signed by Great Britain and Russia; but no convention respecting the freedom of neutral commerce and navigation has been since concluded between these two powers (*o*).

§ 454. The international law of Europe adopted by America, and modified by treaty.

The maritime law of nations, by which the intercourse of the European States is regulated, has been adopted by the new communities which have sprung up in the western hemisphere, and was considered by the United States as obligatory upon them during the war of their revolution. During that war the American Courts of Prize acted upon the generally received principles of European public law, that enemy's property in neutral vessels was liable to, whilst neutral property in an enemy's vessel was exempt from capture and confiscation; until Congress issued an ordinance recognizing the maxims of the armed neutrality of 1780, upon condition that they should be reciprocally acknowledged by the other belligerent powers. In the instructions given by Congress, in 1784, to their ministers appointed to treat with the different European Courts, the same principles were proposed as the basis of negotiation by which the independence of the United States was to be recognized. During the wars of the French Revolution, the United States, being neutral, admitted that the immunity of their flag did not extend to cover enemy's property, as a principle founded in the customary law and established usage of nations, though they sought every opportunity of substituting for it the opposite maxim of *free ships free goods*, by conventional arrangements with such nations as were disposed to adopt that amendment of the law. In the course of the correspondence which took place between the

(*o*) Wheaton's Hist. Law of Nations, pp. 397—401.

minister of the French Republic and the Government of the United States, the latter affirmed that it could not be doubted that, by the general law of nations, the goods of a friend found in the vessel of an enemy are free, and the goods of an enemy found in the vessel of a friend are lawful prize. It was true, that several nations, desirous of avoiding the inconvenience of having their vessels stopped at sea, overhauled, carried into port, and detained, under pretence of having enemy's goods on board, had, in many instances, introduced, by special treaties, the principle that enemy ships should make enemy goods, and friendly ships friendly goods; a principle much less embarrassing to commerce, and equal to all parties in point of gain and loss: but this was altogether the effect of particular treaty, controlling in special cases the general principle of the law of nations, and therefore taking effect between such nations only as have so agreed to control it. England had generally determined to adhere to the rigorous principle, having in no instance, so far as was recollected, agreed to the modification of letting the property of the goods follow that of the vessel, except in the single one of her treaties with France. The United States had adopted this modification in their treaties with France, with the United Netherlands, and with Prussia; and, therefore, as to those powers, American vessels covered the goods of their enemies, and the United States lost their goods when in the vessels of the enemies of those powers. With Great Britain, Spain, Portugal, and Austria, the United States had then no treaties; and therefore had nothing to oppose them in acting according to the general law of nations, that enemy goods are lawful prize though found in the ships of a friend. Nor was it perceived that France could, on the whole, suffer; for though she lost her goods in American vessels, when found therein by England, Spain, Portugal, or Austria; yet she gained American goods when found in the vessels of England, Spain, Portugal, Austria, the United Netherlands, or Prussia: and as the Americans had more goods afloat in the vessels of those six nations, than France had afloat in their vessels, France was the gainer, and they the losers, by the principle of the treaty between the two countries. Indeed, the United States were the losers in every direction of that principle; for when it worked in their favour,

it was to save the goods of their friends; when it worked against them, it was to lose their own, and they would continue to lose whilst it was only partially established. When they should have established it with all nations, they would be in a condition neither to gain nor lose, but would be less exposed to vexatious searches at sea. To this condition the United States were endeavouring to advance; but as it depended on the will of other nations, they could only obtain it when others should be ready to concur (*p*).

§ 455 Conflict in provisions of treaties with England and with France.

By the treaty of 1794 between the United States and Great Britain, article 17, it was stipulated that vessels, captured on suspicion of having on board enemy's property or contraband of war, should be carried to the nearest port for adjudication, and that part of the cargo only which consisted of enemy's property, or contraband for the enemy's use, should be made prize, and the vessel be at liberty to proceed with the remainder of her cargo. In the treaty of 1778, between France and the United States, the rule of *free ships free goods* had been stipulated; and, as we have already seen, France complained that her goods were taken out of American vessels without resistance by the United States, who, it was alleged, had abandoned by their treaty with Great Britain their antecedent engagements to France, recognizing the principles of the armed neutrality.

To these complaints, it was answered by the American government, that when the treaty of 1778 was concluded, the armed neutrality had not been formed, and consequently the state of things on which that treaty operated was regulated by the pre-existing law of nations, independently of the principles of the armed neutrality. By that law, free ships did not make free goods, nor enemy ships enemy goods. The stipulation, therefore, in the treaty of 1778 formed an exception to a general rule, which retained its obligation in all cases where not changed by compact. Had the treaty of 1794 between the United States and Great Britain not been formed, or had it entirely omitted any stipulation on this subject, the belligerent right would still have existed. The

(*p*) Mr. Jefferson's Letter to M. Genet, July 24, 1793. Waite's State Papers, vol. i. p. 134. See also President Jefferson's Letter to Mr. R. R. Livingston, American Minister at Paris, Sept. 9, 1801. Jefferson's Memoirs, vol. iii. p. 489.

treaty did not concede a new right, but only mitigated the practical exercise of a right already acknowledged to exist. The desire of establishing universally the principle, that neutral ships should make neutral goods, was felt by no nation more strongly than by the United States. It was an object which they kept in view, and would pursue by such means as their judgment might dictate. But the wish to establish a principle was essentially different from an assumption that it is already established. However solicitous America might be to pursue all proper means tending to obtain the concession of this principle by any or all of the maritime powers of Europe, she had never conceived the idea of obtaining that consent by force. The United States would only arm to defend their own rights: neither their policy nor their interests permitted them to arm in order to compel a surrender of the rights of others (*q*).

§ 456. Discussion between the American and Prussian governments.

The principle of *free ships free goods* had been stipulated by the treaty of 1785, art. 12, between the United States and Prussia, without the correlative maxim of *enemy ships enemy goods*. By the 12th article of this treaty it was provided, that "if one of the contracting parties should be engaged in war with any other power, the free intercourse and commerce of the subjects or citizens of the party remaining neuter with the belligerent powers shall not be interrupted. On the contrary, in that case, as in full peace, the vessels of the neutral party may navigate freely to and from the ports and on the coasts of the belligerent parties, free vessels making free goods, insomuch that all things shall be adjudged free which shall be on board any vessel belonging to the neutral party, although such things belong to an enemy of the other; and the same freedom shall be extended to persons who shall be on board a free vessel, although they should be enemies to the other party, unless they be soldiers in actual service of such enemy."

§ 457. American instructions to omit the rule of free ships free goods.

The above treaty having expired, by its own limitation, in 1796, a negotiation was commenced by the American and Prussian governments for its renewal. In the instructions given by the former to its plenipotentiary, Mr. J. Q. Adams,

(*q*) Letter of the American Envoys at Paris, Messrs. Marshall, Pinkney, and Gerry, to M. de Talleyrand, Jan. 17, 1798. Waite's State Papers, vol. iv. pp. 38—47.

it was stated that the principle of *free ships free goods*, recognised in the 12th article, was a principle which the United States had adopted in all their treaties, (except that with Great Britain,) and which they sincerely desired might become universal; but they had found by experience, that treaties formed for this object were of little or no avail; because the principle was not universally admitted among maritime nations. It had not been observed in respect to the United States, when it would operate to their benefit; and might be insisted on only when it would prove injurious to their interests. The American plenipotentiary was therefore directed to propose to the Prussian cabinet the abandonment of this article in the new treaty which he was empowered to negotiate (*r*).

It was further stated, in an additional explanatory instruction given by the American government to its plenipotentiary, that, in the former instruction, the earnest wishes of the United States were meant to be expressed, that the principle of *free ships free goods* should become universal. This principle was peculiarly interesting to them, because their naval concerns were mercantile and not warlike; and it would readily be perceived, that the abandonment of that principle was suggested by the measures of the belligerent powers, during the war then existing, in which the United States had found that neither the obligations of the pretended modern law of nations, nor the solemn stipulations of treaties, secured its observation; on the contrary, it had been made the sport of events. Under such circumstances, it appeared to the President desirable to avoid renewing an obligation which would probably be enforced when their interest might require its dissolution, and be contemned when they might derive some advantage from its observance. It was possible, that in the then pending negotiations of peace, the principle of *free ships free goods* might be adopted by all the great maritime powers; in which case the United States would be among the first of the other powers to accede to it, and to observe it as a universal rule. The result of the negotiations would probably be known to the American plenipotentiary, before the renewal of the Prussian Treaty; and he was directed to con-

(*r*) Mr. Secretary Pickering to Mr. John Quincy Adams, Minister of the U. S. at Berlin, July 15, 1797.

form his stipulations on this point to the result of those negotiations. But if the negotiations for peace should be broken up, and the war continued, and more especially if the United States should be forced to become a party to it, then it would be extremely impolitic to confine the exertions of their armed vessels within narrower limits than the law of nations prescribes. If, for instance, France should proceed, rom her predatory attacks on American commerce, to open war, the mischievous consequences of any other limitations would be apparent. All her commerce would be sheltered under neutral flags; whilst the American commerce would remain exposed to the havoc of her numerous cruisers (*s*).

§ 458. Objection of Mr. J. Q. Adams to the omission.

In acknowledging the receipt of these instructions, the American plenipotentiary questioned the expediency of the proposed alteration, in the stipulation contained in the 12th article of the Treaty of 1785. He stated that the principle of making free ships protect enemy's property, had always been cherished by the maritime powers not having large navies, though stipulations to that effect had been, in all wars, more or less violated. In the then present war, indeed, they had been less respected than usual; because Great Britain had held a more uncontrolled command of the sea, and had been less disposed than ever to concede the principle; and because France had disclaimed most of the received and established ideas upon the law of nations, and considered herself as liberated from all the obligations towards other States which interfered with her present objects, or the interests of the moment. Even during that war, however, several decrees of the French Convention, passed at times when the force of solemn national engagements was felt, had recognized the promise contained in the Treaty of 1778, between the United States and France; and, at times, this promise had been, in a great degree, observed. France was still attached to the principles of the armed neutrality, and yet more attached to the idea of compelling Great Britain to assent to them. Indeed, every naval State was interested in the maintenance of liberal maxims in maritime affairs, against the domineering policy of the latter power. Every instance, therefore, in which those principles

(*s*) Mr. Secretary Pickering to Mr. John Quincy Adams, July 17, 1797.

which favour the rights of neutrality should be abandoned by neutral powers, was to be regretted, as furnishing argument, or at least example, to support the British doctrines. There was certainly a great inconvenience, when two maritime States were at war, for a neutral nation to be bound by one principle to one of the parties, and by its opposite to the other; and, in such cases, it was never to be expected that an engagement favourable to the rights of neutrality would be scrupulously observed by either of the warring States. It appeared to the American plenipotentiary that the stipulation ought to be made contingent, and that the contracting parties should agree, that in all cases when one of the parties should be at war, and the other neutral, the neutral bottom should cover enemy's property, *provided the enemy of the warring power admitted the same principle*, and practised upon it in their Courts of Admiralty; but if not, that the rigorous rule of the ordinary law of nations should be observed (*t*).

§ 459. Mr. Adams reconsiders the subject.

In a subsequent communication of the American plenipotentiary to his government, he states that he should be guided by its instructions relative to this matter, although he was still of opinion that the proposed alteration in the previous treaty would be inexpedient. Sweden and Prussia were both strongly attached to the principle of making the ship protect the cargo. They had more than once contended, that such is the rule even by the ordinary law of nations. A Danish writer of some reputation, in a treatise upon the commerce of neutrals in time of war, had laid it down as a rule, and argued formally, that, by the law of nature, free ships make free goods (*u*). Lampredi, a recent Florentine author, upon the same topic, had discussed the question at length; and contended that by the natural law, in this case, there is a collision of two rights equally valid; that the belligerent has a right to detain, but that the neutral has an equal right to refuse to be detained. This reduced the matter to a mere question of force, in which the belligerent, being armed, naturally enjoys the best advantage (*x*). He confessed that

(*t*) Mr. J. Q. Adams to Mr. Secretary Pickering, October 31, 1797; May 17, 1798.

(*u*) Hübner, De la Saisie des Batimens neutres. Wheaton's Hist. Law of Nations, pp. 219—229.

(*x*) Lampredi, Del Commercio dei Popoli neutrali in Tempo de Guerra. Wheaton's Hist. Law of Nations, pp. 314, 319.

the reasoning of Lampredi had, in his mind, great weight, and that this writer appeared to have stated the question in its true light. Under these circumstances, he intended to propose a conditional article, putting the principle upon a footing of reciprocity, and agreeing that the principle, with regard to bottom and cargo, should depend upon the principle guiding the Admiralty Courts of the enemy. This would at once discover the American inclination and attachment to the liberal rule, and yet not make them the victims of their adherence to it, while violated by their adversaries. Acting under the instructions of his government, he should not accede to the renewal of the article, under its form in the previous treaty (*y*).

§ 460. Proposal made to Prussia.

The American negotiator, following the letter of his instructions, proposed, in the first instance, to the Prussian plenipotentiaries, to substitute, instead of this article, the ordinary rule of the law of nations, which subjects to seizure enemy's property on board of neutral vessels. This proposition was supported, upon the ground that although the principle, which communicates to the cargo the character of the vessel, would be conformable to the interests of the United States, of Prussia, and of all the powers preserving neutrality in maritime wars, if it could be universally acknowledged and respected by the belligerent powers; yet it was well known that the powers most frequently engaged in naval wars did not recognize, or, if they recognized, did not respect, the principle. The United States had experienced, during the then present war, the fact, that even the most formal treaty did not secure to them the advantage of this principle; but, on the contrary, only contributed to accumulate the losses of their citizens, by encouraging them to load their vessels with merchandise declared free, which they had, notwithstanding, seen taken and confiscated, as if no engagement had promised them complete security. At the then present moment, neither of the powers at war admitted the freedom of enemy's property on board of neutral vessels. If, in the course of events, either of the contracting parties should be involved in war with one or the other of those powers, she would be obliged to behold her enemy possess

(*y*) Mr. J. Q. Adams to Mr. Secretary Pickering, May 25, 1798.

the advantage of a free conveyance for his goods, without possessing the advantage herself, or else to violate her own engagements, by treating the neutral party as the enemy should treat her (z).

§ 461. Answer of Prussia.

The Prussian plenipotentiaries, in their answer to these arguments, stated that it could not be denied that the ancient principle of the freedom of navigation had been little respected in the two last wars, and especially in that which still subsisted; but it was not the less true that it had served, until the present time, as the basis of the commerce of all neutral nations; that it had been, and was still maintained, in consequence. If it should be suddenly abandoned and subverted in the midst of the then present war, the following consequences would result:—

1. An inevitable confusion in all the commercial speculations of neutral nations, and the rejection of all the claims prosecuted by them in the Admiralty Courts of France and Great Britain, for illegal captures.

2. A collision with the northern powers, which sustained the ancient principle, at that very moment, by armed convoys.

3. Nothing would be gained in establishing, at the present moment, the principle that *neutral property on board enemy vessels should be free from capture.* The belligerent powers would be no more disposed to admit this principle than the other, and it would furnish an additional reason to authorize their tribunals to condemn prizes made in contravention of the ancient rule.

4. Even supposing that the great maritime powers of Europe should be willing to recognize the principle proposed to be substituted by the United States, it would only increase the existing embarrassments incident to judicial proceedings respecting maritime captures; as, instead of determining the national character of the cargo by that of the vessel, it would become necessary to furnish separate proofs applicable to each.

§ 462. Proposal made by Prussia.

All these difficulties combined induced the Prussian minister to insist on inserting the 12th article of the Treaty

(z) Mr. J. Q. Adams to MM. Finkenstein, Alvensleben, and Haugwitz, July 11, 1798.

of 1785 in the new treaty, qualified with the following additional stipulation:—

"That experience having unfortunately proved, in the course of the present war, that the ancient principle of free neutral navigation has not been sufficiently respected by the belligerent powers, the two contracting parties propose, after the restoration of a general peace, to agree, either separately between themselves, or jointly with the other powers alike interested, to concert with the great maritime powers of Europe such an arrangement as may serve to establish, by fixed and permanent rules, the freedom and safety of neutral navigation in future wars (*a*)."

§ 463. Reply of Mr. Adams.

The American negotiator, in his reply to this communication, stated, that the alteration in the former treaty, proposed by his government, was founded on the supposition, that, by the ordinary law of nations, enemy's property on board of neutral vessels, is subject to capture, whilst neutral property, on board of enemy's vessels, is free. That this rule could not be changed but by the consent of all maritime powers, or by special treaties, the stipulations of which could only extend to the contracting parties. That the opposite principle, the establishment of which was one of the main objects of the armed neutrality during the war of American Independence, had not been universally recognized even at that period; and had not been observed, during the then present war, by any one of the powers who acceded to that system. That Prussia herself, whilst she remained a party to the war against France, did not admit the principle; and that, at the then present moment, the ancient principle of the law of nations subsisted in its whole force between all the powers, except in those cases where the contrary rule was stipulated by a positive treaty.

In proposing, therefore, to recognize the freedom of neutral property on board of enemy's vessels, and to recognize, as subject to capture, enemy's property, on board of neutral vessels, nothing more was intended than to confirm by the treaty those principles which already existed independently of all treaty; it was not intended to make, but to avoid a change, in the actual order of things.

(*a*) MM. Finkenstein, Alvensleben, and Haugwitz, to Mr. J. Q. Adams, 25th September, 1798.

Far from wishing to dictate, in this respect, to the belligerent powers, it had not been supposed that an agreement between Prussia and the United States could, in any manner, serve as a rule to other powers not parties to the treaty, in respect to maritime captures; and as the effect of such a convention, even between the contracting parties, would not be retroactive, but would respect the future only, it had been still less supposed that the just claims of the subjects of neutral powers, whether in England or in France, on account of illegal captures, could be in any manner affected by it.

Nor had it been apprehended that such a convention would produce any collision with the northern powers, since they could not be bound by a treaty to which they were not parties; and this supposed contradiction would still less concern Russia, because, far from having maintained the principle that the neutral flag covers enemy's property, she had engaged by her convention with Great Britain, of the 25th of March, 1793, to employ all her efforts against it during the then present war.

Sweden and Denmark, by their convention of the 27th March, 1794, engaged reciprocally towards each other, and towards all Europe, not to claim, except in those cases expressly provided for by treaty, any advantage not founded upon the universal law of nations, "recognized and respected unto the present time by all the powers and by all the sovereigns of Europe." It was not conceived possible to include, under this description, the principle that the cargo must abide the doom of the flag under which it is transported; and it might be added, that experience had constantly demonstrated the insufficiency of armed convoys to protect this principle, since they were seen regularly following, without resistance, the merchant vessel under their convoy into the ports of the belligerent powers, to be there adjudged according to the principles established by their tribunals; principles which were entirely contrary to that by which the ship neutralizes the cargo.

According to the usage adopted by the tribunals of all maritime States, the proofs as to the national character of the cargo ought to be distinct from those which concern that of the vessel. Even in those treaties which adopt the principle that the flag covers the property, it is usual to stipulate for

papers applicable to the cargo, in order to show that it is not contraband. The charter-party and the bills of lading had been referred to by the Prussian ministers, as being required by the Prussian tribunals, and which it was proposed to designate as essential documents in the new treaty. It would seem, then, that the adoption of the principle in question would not require a single additional paper, and, consequently, would not increase the difficulty of prosecuting claims against captors; at the utmost, it could only be regarded as a very small inconvenience, in comparison with the losses occasioned by the recognition of a principle already abandoned by almost all the maritime powers, and which had been efficaciously sustained by none of them; of a principle which would operate injuriously to either of the contracting parties that might be engaged in war, whilst its enemy would not respect it, and that party which remained neutral would hold out to its subjects the illusory promise of a free trade, only to see it intercepted and destroyed.

But as the views of the Prussian government appeared, in some respects to differ from those of the American, in regard to the true principle of the law of nations, and it appeared to the Prussian ministers that several inconveniences might result from the substitution of the opposite principle to that contained in the former treaty, the American negotiator proposed, as an alternative, to omit entirely the stipulations of the 12th article in the new treaty; the effect of which would be, to leave the question in its then present situation, without engaging either of the contracting parties in any special stipulation respecting it. And as the establishment of a permanent and stable system, with the hope of seeing it maintained and respected in future wars, was an important object to commerce in general, and especially to that of the contracting parties, he was willing to consent to an eventual stipulation similar to that proposed by the Prussian ministers; but which, without implying, on either part, the admission of a contested principle, should postpone the decision of it until after the general peace, either by an ulterior agreement between the contracting parties, or in concert with other powers interested in the question. The United States would always be disposed to adopt the most liberal principles that might be

desired, in favour of the freedom of neutral commerce in time of war, whenever there should be a reasonable expectation of seeing them adopted and recognized in a manner that might secure their practical execution (*b*).

§ 464. Further reply of Prussia.

The Prussian ministers replied to this counter proposition, by admitting that the rule by which neutral property, found on board enemy's vessels, was free from capture, had been formerly followed by the greater part of European powers, and was established in several treaties of the fourteenth and fifteenth centuries; but they asserted that it had been abandoned by maritime and commercial nations, ever since the inconveniences resulting from it had become manifest. In the two treaties concluded as early as 1646, by the United Provinces, with France and with England, the rules of free ships free goods, and of enemy ships enemy goods, were stipulated; and these principles, once laid down, had been repeated in almost all the treaties since concluded between the different commercial nations of Europe. The convention of 1793, between Russia and England, to which the American negotiator had referred, was exclusively directed against France, and merely formed an exception to the rule; and if, during the commencement of the revolutionary war, the allied powers deemed it necessary to deviate from the recognized principle, this momentary deviation could only be attributed to peculiar circumstances, and it was not the less certain that Prussia had never followed any other than one and the same permanent system, relative to neutral commerce and navigation. This system was founded upon the maxim announced in the 12th article of her former treaty with the United States, which best accorded with the general convenience of commercial nations, by simplifying the proofs of national character, and exempting neutral navigation from vexatious search and interruption.

The Prussian ministers also declared their conviction that, during the then present war, when the commerce and navigation of neutral nations had been subjected to so many arbitrary measures, the principle proposed by the American negotiator would not be more respected than the former rule; several recent examples having demonstrated that even neutral vessels.

(*b*) Mr. J. Q. Adams to MM. Finkenstein, Alvensleben, and Haugwitz October 29, 1798.

exclusively laden with neutral property, had been subjected to capture and confiscation, under the most frivolous pretexts. But it would be useless to prolong the discussion, as both the parties to the negotiation were agreed that, instead of hazarding a new stipulation, eventual and uncertain in its effects, it would be better to leave it in suspense until the epoch of a general peace, and then to seek for the means of securing the freedom of neutral commerce upon a solid basis during future wars.

§ 465. Second proposal of Prussia.

The Prussian ministers, therefore, propose to suppress provisionally the 12th article of the former treaty, and to substitute in its place the following stipulation:—

"Experience having demonstrated, that the principle adopted in the 12th article of the treaty of 1785, according to which free ships make free goods, has not been sufficiently respected during the last two wars, and especially in that which still subsists; and the contradictory dispositions of the principal belligerent powers not allowing the question in controversy to be determined in a satisfactory manner at the present moment, the two high contracting parties propose, after the return of a general peace, to agree, either separately between themselves, or conjointly with other powers alike interested, to concert with the great maritime powers of Europe such arrangements and such permanent principles, as may serve to consolidate the liberty of neutral navigation and commerce in future wars" (c).

§ 466. Suggestion of Mr. Adams.

In his reply to this note, the American negotiator declared that he would not hesitate to subscribe to the stipulation proposed by the Prussian ministers, if the following words could be omitted: "And the contradictory dispositions of the principal belligerent powers not allowing the question in controversy to be determined in a satisfactory manner at the present moment." It was possible that the belligerent powers might find in these expressions a kind of sanction to their dispositions, which would not accord with the intentions of the contracting parties; and, besides, the American negotiator would desire to omit entirely an allusion to a point, of which it was the wish of the two governments to defer the

(c) MM. Finkenstein, Alvensleben, and Haugwitz, to Mr. J. Q. Adams, 29th October, 1798.

consideration, rather than to announce it formally as a contested question.

In order to justify the opinion of his government on the subject of the principle in question, he deemed it his duty to observe, that this opinion was not founded on the treaties of the fourteenth and fifteenth centuries. He considered the principle of the law of nations as absolutely distinct from the engagements stipulated by particular treaties. These treaties could not establish a fixed principle on this point; because such stipulations bound only the parties by whom they were made, and the persons on whom they operated; and because, too, in the seventeenth and eighteenth centuries, as well as in the fourteenth and fifteenth, different treaties had adopted different rules for each particular case, according to the convenience and agreement of the contracting parties.

§ 467. His argument.

Rejecting, therefore, all positive engagements stipulated in treaties, it might well be doubted whether a single example could be found, antecedent to the American war, of a maritime belligerent power which had adopted the principle, that enemy's property is protected by a neutral flag. For, without speaking of England, whose system in this respect is known, France, by the Ordinance of 1774, renewing the provisions of that of 1681, declared enemy's property, on board neutral vessels, subject to seizure and confiscation. It excepted from this rule the ships of Denmark and the United Provinces, conformably to the treaties then existing between these powers and France. This ordinance continued to have its effect in the French tribunals until the epoch of the Ordinance of the 26th July, 1778. By the first article of this last ordinance the freedom of enemy's property, on board of neutral ships, is yielded to neutrals as a favour, but not as a principle of the law of nations, since the power is reserved to withdraw it at the expiration of six months, if a reciprocal stipulation should not be conceded by the enemy. Spain, by the Ordinance of the 1st of July, 1779, and the 13th March, 1780, ordered, in like manner, the seizure and confiscation of enemy's property, found on neutral vessels.

It would only be added that a celebrated public jurist, a Prussian subject, who, in the first part of the 18th century, wrote a highly esteemed work upon the law of nations, Vattel,

says expressly, (Book 3, sect. 115,) that "when effects belonging to an enemy are found on board a neutral vessel, they may be seized by the laws of war." He cited no example where the opposite principle had been practised or insisted on.

§ 468. Position taken by the United States.

When, however, the system of armed neutrality was announced, the United States, although a belligerent power, hastened to adopt its principles; and during the period succeeding this epoch, in which they were engaged in war, they scrupulously conformed to them. But on the first occasion when, as a neutral power, they might have enjoyed the advantages attached to this system, they saw themselves deprived of these advantages, not only by the powers who had never acceded to those principles, but also even by the founders of the system. The intentions of the combined powers, it was true, were exclusively directed against France; but the operation of their measures did not less extend to all neutrals, and especially to the United States. However peculiar might have been the circumstances of the war, the rights of neutrality could not be thereby affected. The United States had regretted the abandonment of principles favourable to the rights of neutrality, but they had perceived their inability to prevent it; and were persuaded that equity could not require of them to be the victims, at the same time, both of the rule and of the exception; to be bound, as a belligerent party, by laws of the advantage of which, as a neutral power, they were wholly deprived.

It was the wish, however, of the United States government to prove, that it had no desire to depart from the principles adopted by the treaty of 1785, except upon occasions when an adherence to those principles would be an act of injustice to the nation whose interests were confided to it. The American negotiator therefore agreed to adopt the proposed new stipulation, excepting the words above cited, and adding the following clause:—

"And if, during this interval, one of the high contracting parties shall be engaged in a war, to which the other is neutral, the belligerent power will respect all the property of enemies laden on board the vessel of the neutral party, provided that the other belligerent power shall acknowledge the same principle with regard to every neutral vessel, and that

the decisions of his maritime tribunals shall conform to it."

If this proposition should not be acceptable to the Prussian cabinet, then the American negotiator proposed to adopt nearly the formula of the treaty of 1766 between Prussia and Great Britain, and to stipulate that "as to the search of merchant vessels, in time of war, the vessels of war and the private armed vessels of the belligerent power will conduct themselves as favourably as the objects of the then existing war will permit; observing, as much as possible, the principles and rules of the law of nations as generally recognised" (*d*).

§ 469. Conclusion of the treaty.

The treaty was finally concluded on the 11th July, 1799, with the article on this subject proposed by the Prussian plenipotentiaries, and modified on the suggestion of the American negotiator in the following terms:—

"Art. 12. Experience having proved that the principle adopted in the twelfth article of the treaty of 1785, according to which *free ships make free goods*, has not been sufficiently respected during the last two wars, and especially in that which still continues, the two contracting parties propose, after the return of a general peace, to agree, either separately between themselves, or jointly with other powers alike interested, to concert with the great maritime powers of Europe such arrangements and such permanent principles, as may serve to consolidate the liberty and the safety of the neutral navigation and commerce in future wars. And if, in the interval, either of the contracting parties should be engaged in war, to which the other should remain neutral, the ships of war and privateers of the belligerent power shall conduct themselves towards the merchant vessels of the neutral power as favourably as the course of the war then existing may permit; observing the principles and rules of the law of nations generally acknowledged" (*e*).

§ 470. Treaty of 1828 between the United States and Prussia.

On the expiration of the treaty of 1799, the twelfth article of the original treaty of 1785 was again revived, by the present subsisting treaty between the United States and Prussia of 1828, with the addition of the following clause:—

(*d*) Mr. J. Q. Adams to MM. Finkenstein, Alvensleben, and Haugwitz, 24th December, 1799.

(*e*) American State Papers, fol. edit. vol. ii. pp. 251—269.

"The parties being still desirous, in conformity with their intention declared in the twelfth article of the said treaty of 1799, to establish between themselves, or in concert with other maritime powers, further provisions to insure just protection and freedom to neutral navigation and commerce, and which may at the same time advance the cause of civilization and humanity, engage again to treat on this subject at some future and convenient period."

§ 471. Rule in American Prize Courts.

During the war which commenced between the United States and Great Britain in 1812, the Prize Courts of the former uniformly enforced the generally acknowledged rule of international law, that enemy's goods in neutral vessels are liable to capture and confiscation, except as to such powers with whom the American government had stipulated by subsisting treaties the contrary rule, that free ships should make free goods.

§ 472. Treaties between the United States and the South American republics.

In their earliest negotiations with the newly established republics of South America, the United States proposed the establishment of the principle of *free ships free goods*, as between all the powers of the North and South American continents. It was declared that the rule of public law—that the property of an enemy is liable to capture in the vessels of a friend, has no foundation in natural right, and, though it be the established usage of nations, rests entirely on the abuse of force. No neutral nation, it was said, was bound to submit to the usage; and though the neutral may have yielded at one time to the practice, it did not follow that the right to vindicate by force the security of the neutral flag at another, was thereby permanently sacrificed. But the neutral claim to cover enemy's property was conceded to be subject to this qualification; that a belligerent may justly refuse to neutrals the benefit of this principle, unless admitted also by their enemy for the protection of the same neutral flag. It is accordingly stipulated, in the treaty between the United States and the Republic of Columbia, that the rule of *free ships free goods* should be understood "as applying to those powers only who recognize this principle; but if either of the two contracting parties shall be at war with a third, and the other neutral, the flag of the neutral shall cover the property of enemies whose governments acknowledge the same principle,

and not of others." The same restriction of the rule had been previously incorporated into the treaty of 1819, between the United States and Spain, and has been subsequently inserted in their different treaties with the other South American Republics (*f*).

§ 473. Covering enemies' goods in neutral ships by false papers.

It has been decided in the Prize Courts, both of the United States and of Great Britain, that the privilege of the neutral flag of protecting enemy's property, whether stipulated by treaty or established by municipal ordinances, however comprehensive may be the terms in which it may be expressed, cannot be interpreted to extend to the fraudulent use of that flag to cover enemy's property in the *ship*, as well as the cargo (*g*). Thus during the war of the Revolution, the United States, recognizing the principles of the armed neutrality of 1780, exempted by an ordinance of Congress all neutral vessels from capture, except such as were employed in carrying contraband goods, or soldiers, to the enemy; it was held by the continental Court of Appeals in prize causes, that this exemption did not extend to a vessel which had forfeited her privilege by grossly unneutral conduct in taking a decided part with the enemy, by combining with his subjects to wrest out of the hands of the United States, and of France, their ally, the advantages they had acquired over Great Britain by the rights of war in the conquest of Dominica. By the capitulation of that island, all commercial intercourse with Great Britain had been prohibited. In the case in question, the vessel had been purchased in London, by neutrals, who supplied her with false and colourable papers, and assumed on themselves the ownership of the cargo for a voyage from London to Dominica. Had she been employed in a fair commerce, such as was consistent with the rights of neutrality, her cargo, though the property of an enemy, could not be seized as prize of war; because Congress had said, by their ordinance, that the rights of neutrality should extend protection to such effects and goods of an enemy. But if the

(*f*) Mr. Secretary Adams's Letter to Mr. Anderson, American minister to the Republic of Columbia, 27th of May, 1823. For the practice of the prize court, as to the allowance or refusal of freight on enemies' goods taken on board neutral ships, and on neutral goods found on board an enemy ship, see Wheaton's Rep. vol ii. Appendix, Note I. pp. 54—56.

(*g*) *The Citade de Lisboa*, 6 C. Rob. 358.

neutrality were violated, Congress had not said that such a violated neutrality shall give such protection. Nor could they have said so, without confounding all the distinctions of right and wrong; and Congress did not mean, in their ordinance, to ascertain in what cases the rights of neutrality should be forfeited, to the exclusion of all other cases; for the instances not mentioned were as flagrant as the cases particularised (*h*).

By the treaty of 1654, between England and Portugal, it was stipulated (art. 23), "That all goods and merchandise of the said Republic or King, or of their people, or subjects found on board the ships of the enemies of either, shall be made prize, together with the ships, and confiscated. But all the goods and merchandise of the enemies of either on board the ships of either, or of their people or subjects, shall remain free and untouched."

§ 474. Rule of enemy ships enemy goods not applicable when the goods are shipped before war.

Under this stipulation, thus coupling the two opposite maxims of *free ships free goods*, and *enemy ships enemy goods*, it was determined by the British prize courts, that the former provision of this article, which subjects to condemnation the goods of either nation found on board the ships of the enemy of the other contracting party, could not be fairly applied to the case of property *shipped before the contemplation of war*. Sir W. Scott (Lord Stowell) observed, in delivering his judgment in this case, that it did not follow, that because *Spanish* property put on board a *Portuguese* ship, would be protected in the event of the interruption of war, therefore *Portuguese* property on board a *Spanish* ship should become instantly confiscable on the breaking out of hostilities with Spain: that, in one case, the conduct of the parties would not have been different, if the event of hostilities had been known. The cargo was entitled to the protection of the ship, generally, by this stipulation of the treaty, even if shipped in open war; and *à fortiori*, if shipped under circumstances still more favourable to the neutrality of the transaction. In the other case, there might be reason to suppose, that the treaty referred only to goods shipped on board an enemy's vessel, in an avowed hostile character; and that the neutral merchant would have acted differently, if he had been apprized of the

(*h*) *The Erstern*, 2 Dallas, 34.

character of the vessel at the time when the goods were put on board (*i*).

§ 475. The two maxims in later treaties.

The same principle has been frequently incorporated into treaties between various nations, by which the principle of *free ships free goods* is associated with that of *enemy ships enemy goods*. The treaties of Utrecht expressly recognize it, and it has been also incorporated into the different treaties between the United States and the South American Republics, with this qualification, "that it shall always be understood, that the neutral property found on board such enemy's vessels shall be held and considered as enemy's property, and as such shall be liable to detention and confiscation, except such property as was put on board such vessel before the declaration of war, or even afterwards, if it were done without the knowledge of it; but the contracting parties agree that *two* months having elapsed after the declaration, their citizens shall not plead ignorance thereof" (*k*).

§ 475 a. The Declaration of Paris.

This controversy has now been brought to a close as regards all maritime countries but the United States. The Declaration of Paris, 1856, to which all except the United States have acceded, provides as follows:—

Art. 2. The neutral flag covers enemy's goods, with the exception of contraband of war.

Art. 3. Neutral goods, with the exception of contraband of war, are not liable to capture under enemy's flag (*l*).

This Declaration is a great step in favour of neutrals, and curtails the rights of belligerents. But it does not entirely free neutral commerce from the effects of war. The belligerent right of search may still be exercised, both for the purpose of ascertaining the true character of a ship sailing under a neutral flag, and to discover whether she carries any contraband. It has been already said that the United States are not a party to this Declaration, and are therefore not bound by it. Nevertheless during the civil war, these two rules were observed by both parties.

§ 476. Contraband of war.

The general freedom of neutral commerce with the respective belligerent powers is subject to certain exceptions. Among these is the trade with the enemy in certain articles called contraband of war. The almost unanimous authority

(*i*) *The Mariana*, 5 C. Rob. 28.

(*k*) Treaty of 1828, between the United States and Columbia, art. 13. By the treaty of 1831, between the United States and Mexico; by that of 1834, with Chili, art. 13, the term of *four* months is established for the same purpose, and by that of 1842, with Equador, art. 16, the term of *six* months.

(*l*) [See Appendix G.]

of elementary writers, of prize ordinances, and of treaties, agrees to enumerate among these all warlike instruments, or materials by their own nature fit to be used in war. Beyond these, there is some difficulty in reconciling the conflicting authorities derived from the opinions of public jurists, the fluctuating usage among nations, and the text of various conventions designed to give to that usage the fixed form of positive law.

§ 477. Classification of goods as contraband by Grotius.

Grotius, in considering this subject, makes a distinction between those things which are useful only for the purposes of war, those which are not so, and those which are susceptible of indiscriminate use in war and in peace. The *first*, he agrees with all other text writers in prohibiting neutrals from carrying to the enemy, as well as in permitting the *second* to be so carried; the *third* class, such as money, provisions, ships, and naval stores, he sometimes prohibits, and at others permits, according to the existing circumstances of the war (*m*).

§ 478. Position of Vattel.

Vattel makes somewhat of a similar distinction, though he includes timber and naval stores among those articles which are particularly useful for the purposes of war, and are always liable to capture as contraband; and considers pro-

(*m*) "Sed et quæstio incidere solet quid liceat in eos qui hostes non sunt, aut dici nolunt, sed hostibus res aliquas subministrant. Nam et olim et nuper de eâ re acriter certatum scimus, cùm alii belli rigorem, alii commerciorum libertatem defenderent.

"Primum distinguendum inter res ipsas. Sunt enim quæ in bello tantùm usum habent, ut arma: sunt quæ in bello nullum habent usum, ut quæ voluptati inserviunt: sunt quæ in bello et extra bellum usum habent, ut pecuniæ, commeatus, naves, et quæ navibus adsunt. In primo genere verum est dictum Amalasuinthæ ad Justinianum, in hostium esse partibus qui ad bellum necessaria hosti administrat. Secundum genus querelam non habet. . . . . In tertio illo genere usûs ancipitis distinguendus erit belli status. Nam si tueri me non possum nisi quæ mittuntur intercipiam, necessitas, ut alibi exposuimus, jus dabit, sed sub onere restitutionis, nisi causa alia accedat. Quod si juris mei exsecutionem rerum subvectio impedierit, idque scire potuerit qui advexit, ut si oppidum obsessum tenebam, si portus clausos, et jam deditio aut pax exspectabatur, tenebitur ille mihi de damno culpa dato, ut qui debitorem carceri exemit, aut fugam ejus in meam fraudem instruxit: et ad damni dati modum res quoque ejus capi, et dominium earum debiti consequendi causâ quæri poterit. Si damnum nondum dederit sed dare voluerit, jus erit rerum retentione eum cogere ut de futuro caveat obsidibus, pignoribus, aut alio modo. Quod si prætorea evidentissima sit hostis mei in me injustitia, et ille eum in bello iniquissimo confirmet, jam non tantùm civiliter tenebitur de damno, sed et criminaliter, ut is qui judici imminenti reum manifestum eximit: atque eo nomine licebit in eum statuere quod delicto convenit, secundum ea quæ de pœnis diximus, quare intra eum modum etiam spoliari poterit." Grotius, de Jur. Bel. ac Pac. lib. iii. cap. 1, § v. 1, 2, 3.

visions as such only under certain circumstances, "when there are hopes of reducing the enemy by famine" (*n*).

§ 479. Of Bynkershoek.

Bynkershoek strenuously contends against admitting into the list of contraband articles those things which are of promiscuous use in peace and in war. He considers the limitation assigned by Grotius to the right of intercepting them, confining it to the case of necessity, and under the obligation of restitution or indemnification, as insufficient to justify the exercise of the right itself. He concludes that the materials out of which contraband articles may be formed, are not themselves contraband; because if all the materials may be prohibited, out of which something may be fabricated that is fit for war, the catalogue of contraband goods will be almost interminable, since there is hardly any kind of material out of which something, at least, fit for war may not be fabricated. The interdiction of so many articles would amount to a total interdiction of commerce, and might as well be so expressed. He qualifies this general position by stating, that it may sometimes happen that materials for building ships are prohibited, "if the enemy is in great need of them, and cannot well carry on the war without them." On this ground, he justifies the edict of the States-General of 1657 against the Portuguese, and that of 1652 against the English, as exceptions to the general rule that materials for ship-building are not contraband. He also states that "provisions are often excepted" from the general freedom of neutral commerce "when the enemies are besieged by our friends, or are *otherwise* pressed by famine" (*o*).

(*n*) Vattel, Droit des Gens, liv. iii. ch. 7, § 112.

(*o*) "Grotius, in eo argumento occupatus, distinguit inter res, quæ in bello usum habent, et quæ nullum habent, et quæ promiscui usûs sunt, tam in bello, quàm extra bellum. Primum genus non hostes hostibus nostris advehere prohibet, secundum permittit, tertium nunc prohibet, nunc permittit. Si sequamur, quæ *capite præcedenti* disputata sunt, de primo et secundo genere non est, quod magnopere laboremus. In tertio genere distinguit Grotius, et permittit res promiscui usûs intercipere, sed in casu necessitatis, si aliter me meaque tueri non possim, et quidem sub onere restitutionis. Verùm, ut alia præteream, quis arbiter erit ejus necessitatis, nam facillimum est eam prætexere? an ipse ego, qui intercepi? Sic, puto, ei sedet, sed in causâ meâ me sedere judicem omnes leges omniaque jura prohibent, nisi quod usus, Tyrannorum omnium princeps, admittat, ubi fœdera inter Principes explicanda sunt. Nec etiam potui animadvertere, mores Gentium hanc Grotii distinctionem probasse; magis probarunt, quod deinde ait, neque obsessis licere res promiscui usûs advehere, sic enim alteri prodessam in necem alterius, ut latius intelliges ex *Capite seq.* Quòd autem ipse ille Grotius tandem addit, distinguendum esse inter belli justitiam et injustitiam, ad Fœderatos, certo casu,

Valin and Pothier both concur in declaring that provisions (*munitions de bouche*) are not contraband by the prize law of France, or the common law of nations, unless in the single case where they are destined to a besieged or blockaded place (*p*).

§ 480. Naval stores, how far contraband.

Valin, in his commentary upon the marine ordinance of Louis XIV., by which only munitions of war were declared to be contraband, says:—"In the war of 1700, pitch and tar were comprehended in the list of contraband, because the enemy treated them as such, except when found on board Swedish ships, these articles being of the growth and produce of their country. In the treaty of commerce concluded with the King of Denmark, by France, the 23rd of August,

pertinere posse, sed ad eos, qui, neutrarum partium sunt, nunquam pertinere *Capite præced.* mihi visus sum probasse.

. . . . "Ex his fere intelligo, *contrabanda* dici, quæ uti sunt, bello apta esse possunt, nec quicquam interesse, an et extra bellum usum præbeant Paucissima sunt belli instrumenta, quæ non et extra bellum præbeant usum sui. Enses gestamus ornamenti causâ, gladiis animadvertimus in facinorosos, et ipso pulvere bellico utimur pro oblectamento, et ad testandam publicè lætitiam, nec tamen dubitamus, quin ea veniant nomine *τῶν contrabande Waren.* De his, qui promiscui usûs sunt, nullus disputandi esset finis, et nullus quoque, si de necessitate sequimur Grotii sententiam, et varias, quas adjicit, distinctiones. Excute pacta Gentium, quæ diximus, excute et alia quæ alibi exstant, et reperies, omnia illa appellari *contrabanda*, quæ, uti hostibus suggeruntur, bellis gerendis inserviunt, sive instrumenta bellica sint, sive materia per se bello apta: nam quod Ordines Generales 6 Maj. 1667, contra Succos decreverunt, etiam materiam, bello non aptam, sed quæ facilè bello aptari possit, pro *contrabanda* esse habendam, singularem rationem habebat, ex jure nempe retorsionis, ut ipsi Ordines in eo decreto significant.

"Atque ante judicabus, an ipsa materia prohibitarum quoque sit prohibita? Et in eam sententiam, si quid tamen definiat, proclivior esse videtur Zocchius, *de Jure Feciali*, Part II. sect. vii. Q. 8. Ego non essem, quia ratio et exempla me moveant in contrarium. Si omnem materiam prohibeas, ex quâ quid bello aptari possit, ingens esset catalogus rerum prohibitarum, quia nulla fere materia est, ex quâ non saltem aliquid, bello aptum, facilè fabricemus. Hâc interdictâ, tantum non omni commercio interdicimus, quod valde esset inutile. Et § 4, Pacti 1 Dec., 1674, inter Carolum II., Anglæ Reg. et Ordines Generales; et § 4, Pacti 26 Nov., 1675, inter Regem Succorum et Ordines Generales; et § 16, Pacti 12 Oct., 1679, inter eosdem, amicos hostibus quibis arma non licet, permittunt advehere ferrum, æs, metallum, materiam navium, omnia denique quæ ad usum belli parata non sunt. Quandoque tamen accidit, ut et navium materia prohibeatur, si hostis eâ quàm maxime indigeat, et absque eâ commode bellum gerere haud possit. Quum Ordines Generales, in § 2, edicti contra Lysitanos, 31 Dec., 1657, iis, quæ communi Populorum usu *contrabanda* censentur, Lysitanos juvari vetuissent, specialiter addunt in § 3, ejusdem edicti, quia nihil nisi mari a Lysitanis metuebant, ne quis etiam navium materiam iis advehere vellet, palam sic navium materia a *contrabandis* distincta sed ob specialem rationem addita. Ob eandem causam navium materia conjungitur cum instrumentis belli in § 2, edicti contra Anglos, 5 Dec., 1652, et in edicto Ordinum Generalium contra Francos, 9 Mart., 1689. Sed sunt hæ exceptiones, quæ regulam confirmant." Bynkershoek, Quæst. Jur. Pub. lib. i. cap. 10.

(*p*) Valin, Comment. sur l'Ordon. liv. iii. tit. 9. Des Prises, art. 11. Pothier, de Propriété, No. 104.

1742, pitch and tar were also declared contraband, together with resin, sail-cloth, hemp and cordage, masts, and ship-timber. Thus, as to this matter there is no fault to be found with the conduct of the English, except where it contravenes particular treaties; for in law these things are now contraband, and have been so since the beginning of the present century, which was not the case formerly, as it appears by ancient treaties, and particularly that of St. Germain, concluded with England in 1677; the fourth article of which expressly provides that the trade in all these articles shall remain free, as well as in everything necessary to human nourishment, with the exception of places besieged or blockaded" (*q*).

§ 481. Judgment of Lord Stowell as to naval stores.

In the famous case of the Swedish convoy, determined in the English Court of Admiralty, in 1799, Sir W. Scott (Lord Stowell) states, "that tar, pitch, and hemp, going to the enemy's use, are liable to be seized as contraband in their own nature, cannot, I conceive, be doubted under the modern law of nations; though formerly, when the hostilities of Europe were less naval than they have since become, they were of a *disputable nature*, and perhaps continued so at the time of making that treaty," (that is, the treaty of 1661, between Great Britain and Sweden, which was still in force when he was pronouncing this judgment,) "or at least at the time of making that treaty which is the basis of it, I mean the treaty in which Whitlock was employed in 1656; for I conceive that Valin expresses the truth of this matter when he says: '*De droit* ces choses,' (speaking of naval stores,) 'sont de contrabande aujourd'hui, et depuis le commencement de ce siècle, ce qui n'étoit pas autrefois néanmoins;'—and Vattel, the best recent writer upon those matters, explicitly admits amongst positive contraband, 'les bois, et tout ce qui sert à la construction et à l'armement de vaisseaux de guerre.' Upon this principle was founded the modern explanatory article of the Danish treaty, entered into in 1780, on the part of Great Britain by a noble lord (Mansfield) then Secretary of State, whose attention had been peculiarly turned to subjects of this nature. I am, therefore, of opinion, that, although it might be shown that the nature of these commodities had been sub-

(*q*) Valin, Comm. sur. l'Ordon. liv. iii. tit. 9. Des Prises, art. 11.

ject to some controversy in the time of Whitlock, when the fundamental treaty was constructed, and therefore a discreet silence concerning them was observed in the composition of that treaty, and of the latter treaty derived from it, yet that the exposition which the later judgment and practice of Europe had given upon this subject would, in some degree, affect and supply what the treaties had been content to leave on that indefinite and disputable footing, on which the notions then more generally prevailing in Europe had placed it" (*r*).

§ 482. Criticism on this decision.

It seems difficult to read the treaties of 1656 and 1661, between Great Britain and Sweden, as fairly admitting the interpretation placed upon them in the above cited judgment. These treaties, together with those subsequently concluded between the same powers in 1664 and 1665, all enumerate coined money, provisions, and munitions of war, as contraband between the contracting parties; and the *discreet silence* referred to by Lord Stowell is sufficiently supplied by the treaties of 1664 and 1665, which expressly declared, that "where one of the parties shall find itself at war, commerce and navigation shall be free for the subjects of that power which shall not have taken any part in it with the enemies of the other; and that they shall, consequently, be at liberty to carry to them directly all the articles which are not specially excepted by the 11th article of the treaty concluded at London in 1661, nor by virtue of this same article expressly declared prohibited or contraband, or which are not enemy's property." The following article is still more explicit: "And to the end that it may be known to all those who shall read these presents, what are the goods especially excepted and prohibited, or regarded as contraband, it has appeared fit to enumerate them here according to the aforesaid 11th article of the Treaty of London. These goods specially designated are the following," &c. Here follows the enumeration, as in the 11th article, which makes no mention of naval stores (*s*).

§ 483. Views of Sir L. Jenkins.

This view seems to be confirmed by the opinion given, in 1674, by Sir Leoline Jenkins, to King Charles II., in the case of a cargo of naval stores, the produce of Sweden, belonging

(*r*) *The Maria*, 1 C. Rob. 372.

(*s*) Schlegel, Examen de la Sentence prononcée par le tribunal d'Amiraut Anglaise, le 11 Juin, 1799, dans l'affaire du convoi Suédois, p. 125.

to an English subject, taken on board a Swedish vessel, and carried into Ostend by a Spanish privateer. "There is not any pretence to make the pitch and tar belonging to your Majesty's subjects to be contraband; these commodities not being enumerated in the 24th article of the treaty made between your Majesty and the crown of Spain, in the year 1667, are consequently declared not to be contraband in the article next following. The single objection that seems to lie against the petitioner in this case is, that this tar and pitch is found laden, not in an English, but a Swedish bottom, as by the proofs and documents on board it doth appear; and, consequently, that the benefit of those articles in the Spanish Treaty cannot be claimed here, since they are in favour of our trade in those commodities that shall be found laden in our own, not in foreign bottoms. But it is not probable that Sweden hath suffered or allowed, in any treaty of theirs with Spain, that their own native commodities, pitch and tar, should be reputed contraband. These goods, therefore, if they be not made unfree by being found in an unfree bottom, cannot be judged by any other law than by the general law of nations; and then I am humbly of opinion, that nothing ought to be judged contraband by that law in this case, except it be in the case of besieged places, or of a general notification made by Spain to all the world, that they will condemn all the pitch and tar they meet with. So that, upon the whole, your Majesty's gracious intercession for, and protection to the petitioner in his claim, will be founded, not upon the equity and the true meaning of your Majesty's treaty with Spain, but upon the general law and practice of all nations" (*t*).

§ 484. Anglo-French treaties as to naval stores.

By the treaty of navigation and commerce of Utrecht, between Great Britain and France, renewed and confirmed by the Treaty of Aix-la-Chapelle, in 1748, by the Treaty of Paris, in 1763, by that of Versailles, in 1783, and by the commercial treaty between France and Great Britain, of 1786, the list of contraband is strictly confined to munitions of war; and naval stores, provisions, and all other goods which have not been worked into the form of any instrument or furniture for warlike use, by land or by sea, are expressly excluded from this list.

§ 485. England

The subject of the contraband character of naval stores con-

(*t*) Life and Correspondence of Sir L. Jenkins, vol. ii. p. 751.

and the Baltic powers.

tinued a vexed question between Great Britain and the Baltic powers, throughout the whole of the eighteenth century. Various relaxations of the extreme belligerent pretensions on this subject had been conceded in favour of the commerce, in articles the peculiar growth and productions of these States, either by permitting them to be freely carried to the enemy's ports, or by mitigating the original penalty of confiscation, on their seizure, to the milder right of preventing the goods being carried to the enemy, and applying them to the use of the belligerent, on making a pecuniary compensation to the neutral owner. This controversy was at last terminated by the convention between Great Britain and Russia, concluded in 1801, to which Denmark and Sweden subsequently acceded. By the 3rd article of this treaty it is declared, "That, in order to avoid all ambiguity in what ought to be considered as contraband of war, his Imperial Majesty of all the Russias and his Britannic Majesty declare, conformably to the 11th article of the treaty of commerce, concluded between the two crowns on the 10th (21st) February, 1797, that they acknowledge as such only the following articles, namely, cannons, mortars, fire-arms, pistols, bombs, grenades, balls, bullets, firelocks, flints, matches, powder, saltpetre, sulphur, helmets, pikes, swords, sword-belts, saddles and bridles; excepting, however, the quantity of the said articles which may be necessary for the defence of the ship and of those who compose the crew; and all other articles whatever, not enumerated here, shall not be considered warlike and naval ammunition, nor be subject to confiscation, and of course shall pass freely, without being subject to the smallest difficulty, unless they be considered as enemy's property in the above settled sense. It is also agreed, that what is stipulated in the present article shall not be to the prejudice of the particular stipulations of one or the other crown with other powers, by which objects of a similar kind should be reserved, provided, or permitted."

§ 456. Treaty of 1801.

The object of this convention is declared, in its preamble, to be the settlement of the differences between the contracting parties, which had grown out of the armed neutrality, by "an invariable determination of their principles upon the rights of neutrality, in their application to their respective monarchies;" which object was accomplished by the northern powers yield-

kin.

ing the rule of *free ships free goods*, whilst Great Britain conceded the points asserted by them as to contraband, blockades, and the coasting and colonial trade.

The 8th article of the treaty also declared, that "the principles and measures adopted by the present act, shall be alike applicable to all the maritime wars in which one of the two powers may be engaged, whilst the other remains neutral. These stipulations shall consequently be regarded as permanent, and shall serve for a constant rule to the contracting powers, in matters of commerce and navigation."

§ 487. Anglo-Swedish treaty of 1803.

The list of contraband, contained in the convention between Great Britain and Russia, to which Sweden acceded, differed, in some respects, from that contained in the 11th article of the Treaty of 1661, between Great Britain and Sweden. In order to prevent a recurrence of the disputes which had arisen relative to that article, a convention was concluded at London, between these two powers, on the 25th of July, 1803, by which the list of contraband, contained in the convention between Great Britain and Russia, was augmented, with the addition of the articles of coined money, horses, and the necessary equipments of cavalry, ships of war, and all manufactured articles, serving immediately for their equipment, all which articles were subjected to confiscation. It was further stipulated, that all naval stores, the produce of either country, should be subject to the right of pre-emption by the belligerent party, upon condition of paying an indemnity of ten per centum upon the invoice price or current value, with demurrage and expenses. If bound to a neutral port, and detained upon suspicion of being bound to an enemy's port, the vessels detained were to receive an indemnity, unless the belligerent government chose to exercise the right of pre-emption; in which case, the owners were to be entitled to receive the price which the goods would have sold for at their destined port, with demurrage and expenses (*u*).

§ 488. Provisions and naval stores, when contraband independently of treaty.

The doctrine of the British Prize Courts, as to provisions and naval stores becoming contraband, independently of special treaty stipulations, is laid down very fully by Sir W. Scott, in the case of *The Jonge Margaretha*. He there states that the catalogue of contraband had varied very much, and

(*u*) Martens, Recueil, tome vii. pp. 150—281.

sometimes in such a manner as to make it difficult to assign the reason of the variations, owing to particular circumstances, the history of which had not accompanied the history of the decisions. "In 1673, when many unwarrantable rules were laid down by public authority respecting contraband, it was expressly asserted, by a person of great knowledge and experience in the English admiralty, that, by its practice, *corn*, *wine*, and *oil*, were liable to be deemed contraband. In much later times, many sorts of provisions, such as butter, salted fish, and rice, have been condemned as contraband. The modern established rule was, that generally they are not contraband, but may become so under circumstances arising out of the peculiar situation of the war, or the condition of the parties engaged in it. Among the causes which tend to prevent provisions from being treated as contraband, one is, that they are of the growth of the country which exports them. Another circumstance, to which some indulgence by the practice of nations is shown, is when the articles are in their native and unmanufactured state. Thus iron is treated with indulgence, though anchors and other instruments fabricated out of it are directly contraband. Hemp is more favourably considered than cordage; and wheat is not considered so noxious a commodity as any of the final preparations of it for human use. But the most important distinction is, whether the articles are destined for the ordinary uses of life, or for military use. The nature and quality of the port to which the articles were going, is a test of the matter of fact to which the distinction is to be applied. If the port is a general commercial port, it shall be understood that the articles were going for civil use, although occasionally a frigate or other ships of war may be constructed in that port. On the contrary, if the great predominant character of a port be that of a port of naval equipment, it shall be intended that the articles were going for military use, although merchant ships resort to the same place, and although it is possible that the articles might have been applied to civil consumption; for it being impossible to ascertain the final application of an article *ancipitis usûs*, it is not an injurious rule which deduces both ways the final use from the immediate destination; and the presumption of a hostile use, founded on its destination to a

military port, is very much inflamed, if, at the time when the articles were going, a considerable armament was notoriously preparing, to which a supply of those articles would be eminently useful" (*x*).

§ 489. Articles of promiscuous use becoming contraband, when destined to a port of naval equipment.

The distinction, under which articles of promiscuous use are considered as contraband, when destined to a port of naval equipment, appears to have been subsequently abandoned by Sir W. Scott. In the case of *The Charlotte*, he states that "the character of the port is immaterial; since naval stores, if they are to be considered as contraband, are so without reference to the nature of the port, and equally, whether bound to a mercantile port only, or to a port of naval military equipment. The consequence of the supply may be nearly the same in either case. If sent to a mercantile port, they may then be applied to immediate use in the equipment of privateers, or they may be conveyed from the mercantile to the naval port, and there become subservient to every purpose to which they could have been applied if going directly to a port of naval equipment" (*y*).

§ 490. Provisions becoming contraband under certain circumstances of war.

The doctrine of the English Courts of Admiralty, as to provisions becoming contraband under certain circumstances of war, was adopted by the British government in the instructions given to their cruisers on the 8th June, 1793, directing them to stop all vessels laden wholly or in part with corn, flour, or meal, bound to any port in France, and to send them into a British port, to be purchased by government, or to be released, on condition that the master should give security to dispose of his cargo in the ports of some country in amity with his Britannic Majesty. This order was justified, upon the ground that, by the modern law of nations, all provisions are to be considered contraband, and, as such, liable to confiscation, wherever the depriving an enemy of these supplies is one of the means intended to be employed for reducing him to terms. The actual situation of France (it was said) was notoriously such, as to lead to the employing this mode of distressing her by the joint operations of the different powers engaged in the war; and the reasoning which the text-writers apply to all cases of this sort, was more

(*x*) *The Jonge Margaretha*, 1 C. Rob. 192
(*y*) *The Charlotte*, 5 C. Rob. 305.

applicable to the present case, in which the distress resulted from the unusual mode of war adopted by the enemy himself, in having armed almost the whole labouring class of the French nation, for the purpose of commencing and supporting hostilities against almost all European governments; but this reasoning was most of all applicable to a trade, which was in a great measure carried on by the then actual rulers of France, and was no longer to be regarded as a mercantile speculation of individuals, but as an immediate operation of the very persons who had declared war, and were then carrying it on against Great Britain (*z*).

§ 491. Doctrine of the neutral powers.

This reasoning was resisted by the neutral powers, Sweden, Denmark, and especially the United States. The American government insisted, that when two nations go to war, other nations, who choose to remain at peace, retain their natural right to pursue their agriculture, manufactures, and other ordinary vocations; to carry the produce of their industry for exchange to all countries, belligerent or neutral, as usual; to go and come freely, without injury or molestation; in short, that the war among others should be, for neutral nations, as if it did not exist. The only restriction to this general freedom of commerce, which has been submitted to by nations at peace, was that of not furnishing to either party implements merely of war, nor any thing whatever to a place blockaded by its enemy. These implements of war had been so often enumerated in treaties under the name of contraband, as to leave little question about them at that day. It was sufficient to say that corn, flour, and meal, were not of the class of contraband, and consequently remained articles of free commerce. The state of war then existing between Great Britain and France furnished no legitimate right to either of these belligerent powers to interrupt the agriculture of the United States, or the peaceable exchange of their produce with all nations. If any nation whatever had the right to shut against their produce all the ports of the earth except her own, and those of her friends, she might shut these also, and thus prevent altogether the export of that produce (*a*).

(*z*) Mr. Hammond's Letter to Mr. Jefferson, 12th September, 1793. Waite's State Papers, vol. i. p. 398.

(*a*) Mr. Jefferson's Letter to Mr. T. Pinkney, 7th September, 1793. Waite's State Papers, vol. i. p. 393.

§ 492. Anglo-American treaty of 1794.

In the treaty subsequently concluded between Great Britain and the United States, on the 19th November, 1794, it was stipulated, (article 18,) that under the denomination contraband should be comprised all arms and implements serving for the purposes of war, "and also timber for ship-building, tar or rosin, copper in sheets, sails, hemp, and cordage, and generally whatever may serve directly to the equipment of vessels, unwrought iron and fir planks only excepted." The article then goes on to provide, that "whereas *the difficulty of agreeing on the precise cases, in which alone provisions and other articles, not generally contraband, may be regarded as such*, renders it expedient to provide against the inconveniences and misunderstandings which might thence arise; it is further agreed, that whenever any such articles, so becoming contraband according to the existing law of nations, shall for that reason be seized, the same shall not be confiscated; but the owners thereof shall be speedily and completely indemnified; and the captors, or, in their default, the government under whose authority they act, shall pay to the masters or owners of such vessels the full value of all such articles, with a reasonable mercantile profit thereon, together with the freight, and also the demurrage incident to such detention."

§ 493. British provision order of April, 1795.

The instructions of June, 1793, had been revoked previous to the signature of this treaty; but, before its ratification, the British government issued, in April, 1795, an Order in Council, instructing its cruisers to stop and detain all vessels, laden wholly or in part with corn, flour, meal, and other articles of provisions, and bound to any port in France, and to send them to such ports as might be most convenient, in order that such corn, &c., might be purchased on behalf of government.

§ 494. Legality of this order questioned.

This last order was subsequently revoked, and the question of its legality became the subject of discussion before the mixed commission, constituted under the treaty to decide upon the claims of American citizens, by reason of irregular or illegal captures and condemnations of their vessels and other property, under the authority of the British government. The Order in Council was justified upon two grounds:—

1. That it was made when there was a prospect of reducing the enemy to terms by famine, and that, in such a state of

things, provisions bound to the ports of the enemy became so far contraband, as to justify Great Britain in seizing them upon the terms of paying the invoice price, with a reasonable mercantile profit thereon, together with freight and demurrage.

2. That the order was justified by *necessity;* the British nation being at that time threatened with a scarcity of the articles directed to be seized.

The first of these positions was rested not only upon the general law of nations, but upon the above-quoted article of the treaty between Great Britain and America.

§ 495. Opinion of Vattel upon it.

The evidence adduced of this supposed law of nations was principally the following passage of Vattel: "Commodities particularly useful in war, and the carrying of which to an enemy is prohibited, are called contraband goods. Such are arms, ammunition, timber for ship-building, every kind of naval stores, horses, and even provisions, in certain junctures, when we have hopes of reducing the enemy by famine" (*b*).

In answer to this authority, it was stated that it might be sufficient to say that it was, at best, equivocal and indefinite, as it did not designate what the junctures are in which it might be held, that "there are hopes of reducing the enemy by famine;" that it was entirely consistent with it to affirm, that these hopes must be built upon an obvious and palpable chance of effecting the enemy's reduction by this obnoxious mode of warfare, and that no such chance is by the law of nations admitted to exist, except in certain defined cases; such as the actual siege, blockade, or investment of particular places. This answer would be rendered still more satisfactory, by comparing the above-quoted passage with the more precise opinions of other respectable writers on international law, by which might be discovered that which Vattel does not profess to explain—the combination of circumstances to which his principle is applicable, or is intended to be applied.

But there was no necessity for relying wholly on this answer, since Vattel would himself furnish a pretty accurate commentary on the vague text which he had given. The only instance put by this writer, which came within the range of his general principle, was that which he, as well as Grotius, had taken from Plutarch. "Demetrius," as Grotius expressed

(*b*) Droit des Gens, liv. iii. ch. 7, § 112.

it, "held Attica by the sword. He had taken the town of Rhamnus, *designing a famine in Athens*, and had almost accomplished his design, when a vessel laden with provisions attempted to relieve the city." Vattel speaks of this as of a case in which provisions were contraband (section 17), and although he did not make use of this example for the declared purpose of rendering more specific the passage above cited, yet, as he mentions none other to which it can relate, it is strong evidence to show that he did not mean to carry the doctrine of special contraband farther than that example would warrant.

It was also to be observed that, in section 113, he states expressly that all contraband goods (including, of course, those becoming so by reason of the junctures of which he had been speaking at the end of section 112) are to be confiscated. But nobody pretended that Great Britain could rightfully have *confiscated* the cargoes taken under the order of 1795; and yet if the seizures made under that order fell within the opinion expressed by Vattel, the confiscation of the cargoes seized would have been justifiable. It had long been settled, that all contraband goods are subject to forfeiture by the law of nations, whether they are so in their own nature, or become so by existing circumstances; and even in early times, when this rule was not so well established, we find that those nations who sought an exemption from forfeiture, never claimed it upon grounds peculiar to any description of contraband, but upon general reasons, embracing all cases of contraband whatsoever. As it was admitted, then, that the cargoes in question were not subject to forfeiture as contraband, it was manifest that the juncture which gave birth to the Order in Council could not have been such a one as Vattel had in view; or, in other words, that the cargoes were not become contraband at all within the true meaning of his principle, or within any principle known to the general law of nations.

The authority of Grotius was also adduced as countenancing this position.

§ 496. Opinion of Grotius.

Grotius divides commodities into three classes, the first of which he declares to be plainly contraband; the second plainly not so; and as to the third, he says:—"In tertio illo genere usûs ancipitis, distinguendus erit belli status. Nam si tueri

me non possum nisi quæ mittuntur intercipiam, necessitas, ut alibi exposuimus, jus dabit, sed sub onere restitutionis, nisi causa alia accedat." This "causa alia" is afterwards explained by an example, "ut si oppidum obsessum tenebam, si portus clausos, et jam deditio aut pax expectabatur."

This opinion of Grotius, as to the third class of goods, did not appear to proceed at all upon the notion of contraband, but simply upon that of a pure necessity on the part of the capturing belligerent. He does not consider the right of seizure as a means of effecting the reduction of the enemy, but as the indispensable means of our own defence. He does not state the seizure upon any supposed illegal conduct in the neutral, in attempting to carry articles of the third class (among which provisions are included), *not bound to a port besieged or blockaded*, to be lawful, when made with the mere view of annoying or reducing the enemy, but solely when made with a view to our own preservation or defence, under the pressure of that imperious and unequivocal necessity, which breaks down the distinctions of property, and, upon certain conditions, revives the original right of using things as if they were in common.

This necessity he explains at large in his second book, (cap. ii. sec. 6,) and, in the above-recited passage, he refers expressly to that explanation. In sections 7, 8, and 9, he lays down the conditions annexed to this right of necessity: as, 1. It shall not be exercised until all other possible means have been used; 2. Nor if the right owner is under a like necessity; and, 3. Restitution shall be made as soon as practicable.

In his third book, (cap. xvii. sec. 1,) recapitulating what he had before said on this subject, Grotius further explains this doctrine of necessity, and most explicitly confirms the construction placed upon the above-cited texts. And Rutherforth, in commenting on Grotius, (lib. iii. cap. 1, sect. 5,) also explains what he there says of the right of seizing provisions upon the ground of necessity; and supposes his meaning to be that the seizure would not be justifiable in that view, "unless the exigency of affairs is such, that we cannot possibly do without them" (c).

(c) Rutherforth's Inst. vol. ii. b. ii. ch. 9, § 19.

§ 497. Opinion of Bynkershoek.

Bynkershoek also confines the right of seizing goods, not generally contraband of war, (and provisions among the rest,) to the above-mentioned cases (*d*).

It appeared, then, that so far as the authority of text writers could influence the question, the Order in Council of 1795 could not be rested upon any just notion of contraband: nor could it, in that view, be justified by the reason of the thing or the approved usage of nations.

§ 498. General principles.

If the mere hope, however apparently well founded, of annoying or reducing an enemy, by intercepting the commerce of neutrals in articles of provision (which, in themselves, are no more contraband than ordinary merchandise), to ports not besieged or blockaded, would authorize that interruption, it would follow that a belligerent might at any time prevent, without a siege or blockade, all trade whatsoever with its enemy; since there is at all times reason to believe that a nation, having little or no shipping of its own, might be so materially distressed by preventing all other nations from trading with it, that such prevention might be a powerful instrument in bringing it to terms. The principle is so wide in its nature, that it is, in this respect, incapable of any boundary. There is no solid distinction, in this view of the principle, between provisions and a thousand other articles. Men must be clothed as well as fed; and even the privation of the conveniences of life is severely felt by those to whom habit has rendered them necessary. A nation, in proportion as it can be debarred its accustomed commercial intercourse with other States, must be enfeebled and impoverished; and if it is allowable to a belligerent to violate the freedom of neutral commerce, in respect to any one article not contraband *in se*, upon the expectation of annoying the enemy, or bringing him to terms by a seizure of that article, and preventing it reaching his ports, why not, upon the same expectation of annoyance, cut off as far as possible by captures, all communication with the enemy, and thus strike at once effectually at his power and resources?

§ 499. Anglo-American treaty of 1794.

As to the 18th article of the Treaty of 1794, between the United States and Great Britain, it manifestly intended to leave the question where it found it; the two contracting

(*d*) Bynkershoek, Quæst. Jur. Pub. lib. i. cap. 9.

parties, not being able to agree upon a definition of the cases in which provisions and other articles, not generally contraband, might be regarded as such (the American government insisting on confining it to articles destined to a place actually besieged, blockaded, or invested, whilst the British government maintained that it ought to be extended to all cases where there is an expectation of reducing the enemy by famine), concurred in stipulating, that "whenever any such articles, so becoming contraband, *according to the existing law of nations*, shall for that reason be seized, the same shall not be confiscated," but the owners should be completely indemnified in the manner provided for in the article. When the law of nations existing at the time the case arises pronounces the articles contraband, they may for that reason be seized; when otherwise, they may not be seized. Each party was thus left as free as the other to decide whether the law of nations, in the given case, pronounced them contraband or not, and neither was obliged to be governed by the opinion of the other. If one party, on a false pretext of being authorized by the law of nations, made a seizure, the other was at full liberty to contest it, to appeal to that law, and, if he thought fit, to resort to reprisals and war.

§ 500. Justification of the necessity of the order.

As to the second ground upon which the Order in Council was justified, *necessity*, Great Britain being, as alleged at the time of issuing it, threatened with a scarcity of those articles directed to be seized, it was answered that it would not be denied that extreme necessity might justify such a measure. It was only important to ascertain whether that necessity then existed, and upon what terms the right it communicated might be carried into exercise.

Grotius, and the other text writers on the subject, concurred in stating that the necessity must be real and pressing; and that even then it does not confer a right of appropriating the goods of others, until all other practicable means of relief have been tried and found inadequate. It was not to be doubted that there were other practicable means of averting the calamity apprehended by Great Britain. The offer of an advantageous market in the different ports of the kingdom, was an obvious expedient for drawing into them the produce of other nations. Merchants do not require to be forced into

a profitable commerce; they will send their cargoes where interest invites; and if this inducement is held out to them in time, it will always produce the effect intended. But so long as Great Britain offered less for the necessaries of life than could have been obtained from her enemy, was it not to be expected that neutral vessels should seek the ports of that enemy, and pass by her own? Could it be said that, under the mere apprehension (not under the actual experience) of scarcity, she was authorized to have recourse to the forcible means of seizing provisions belonging to neutrals, without attempting those means of supply which were consistent with the rights of others, and which were not incompatable with the exigency? After this order had been issued and carried into execution, the British government did what it should have done before; it offered a bounty upon the importation of the articles of which it was in want. The consequence was, that neutrals came with these articles, until at length the market was found to be overstocked. The same arrangement, had it been made at an earlier period, would have rendered wholly useless the order of 1795.

§ 501. Decision respecting the order.

Upon these grounds, a full indemnification was allowed by the commissioners, under the seventh article of the Treaty of 1794, to the owners of the vessels and cargoes seized under the Orders in Council, as well for the loss of a market as for the other consequences of their detention (*e*).

§ 501a. What goods are contraband.

The question as to what is, and what is not, contraband, cannot as yet be answered with precision. No complete list of goods which are to be always deemed contraband has been drawn up, nor does it seem likely that it ever will be. That which is contraband under certain circumstances may not be so under others. The main point, when an article is of doubtful use, is whether it was intended, or would probably be applied, to military purposes. In England and America, the Court before which the goods are brought, will inquire into all the circumstances of the case, such as the destination of the ship, the purposes to which the goods seem intended to be applied, the character of the war, and so on, and will condemn or release them upon the evidence (*f*). If, however, there are any treaty stipulations on the subject, or if the State before whose Courts the goods are brought, has issued any definite list

(*e*) Proceedings of the Board of Commissioners under the seventh article of the Treaty of 1794. MS. Opinion of Mr. W. Pinkney, case of *The Neptune*.

(*f*) [Wheaton, by Dana, note 226. Calvo, vol. ii. § 1114. Kent, by Abdy, p. 359. Parl. Debates, 26th May, 1861.]

of contraband goods (*g*), the decision will of course be regulated accordingly. "The liability to capture," says Halleck, "can only be determined by the rules of international law, *as interpreted and applied by the tribunals of the belligerent State*, to the operations of whose cruisers the neutral merchant is exposed" (*h*).

Goods always deemed contraband in England.

The following goods have been held to be always contraband by the English Prize Court: arms of all kinds, and machinery for manufacturing arms, ammunition, and materials for ammunition, including lead, sulphate of potash, muriate of potash, chlorate of potash, and nitrate of soda; gunpowder and its materials, saltpetre and brimstone; also guncotton; military equipments and clothing, and military stores (*i*). Naval stores, such as masts (*k*), spars, rudders, and ship timber (*l*), hemp (*m*), cordage, sailcloth (*n*), pitch and tar (*o*), and copper fit for sheathing vessels (*p*). Marine engines, and the component parts thereof, including screw propellers, paddle-wheels, cylinders, cranks, shafts, boilers, tubes for boilers, boiler plates, and fire-bars; marine cement, and the materials used in the manufacture of it, as blue lias and portland cement; iron in any of the following forms: anchors, rivet-iron, angle-iron, round bars of from three-quarters to five-eighths of an inch in diameter, rivets, strips of iron, sheet plate-iron exceeding one-quarter of an inch, and low-moor and bowling plates (*q*).

Goods conditionally contraband in England.

The following articles have been held to be contraband when the circumstances showed that they were probably intended to be applied to warlike purposes. Provisions and liquors fit for the consumption of army or navy (*r*), money, telegraphic materials—such as wire, porous cups, platina, sulphuric acid, and zinc (*s*); materials for the construction of a railway—as iron bars, sleepers (*t*); hay, horses, rosin (*u*), tallow (*x*), and timber (*y*).

The Proclamation of the President of the United States (13th June, 1865), removing the restrictions on trade with the Southern States, only declared the following articles to be contraband:—arms, ammunition, all articles from which ammunition is made, and gray uniforms and cloth (*z*). The Declaration of Paris, while permitting the seizure of

(*g*) [As France did in 1870. See *post*.]
(*h*) [Halleck, ch. xxiv. § 19.]
(*i*) [Lushington, Naval Prize Law, p. 35.]
(*k*) [*The Charlotte*, 5 C. Rob. 305; *The Staadt Embden*, 1 C. Rob. 27.]
(*l*) [*The Twende Brodre*, 4 C. Rob. 33.]
(*m*) [*The Apollo*, 4 ibid. 161; *The Evert*, 4 ibid. 354; *The Gesellschaft Michael*, 4 ibid. 94.]
(*n*) [*The Neptunus*, 3 C. Rob. 108.]
(*o*) [*The Jonge Tobias*, 1 C. Rob. 329; *The Twee Juffrouwen*, 4 ibid. 242.]
(*p*) [*The Charlotte*, 5 C. Rob. 275.]
(*q*) [Lushington, Naval Prize Law, p. 35. Field, International Code (2nd ed.), p. 550.]
(*r*) [*The Haalet*, 2 C. Rob. 182; *The Jonge Margaretha*, 1 ibid. 191; *The Ranger*, 6 ibid. 125.]
(*s*) [Parl Papers, N. America, 1863 (No. 14), p. 5.]
(*t*) [Field, International Code (2nd ed.), p. 550.]
(*u*) [*The Nostra Signora de Begoña*, 5 C. Rob. 98.]
(*x*) [*The Neptunus*, 3 C. Rob. 108.]
(*y*) [*The Twende Brodre*, 4 C. Rob. 37.]
(*z*) [Hertslet's Treaties, vol. xii. p. 946.]

contraband, in no way defines it. The instructions to French naval officers during the war with Germany in 1870-71, enumerate as contraband: cannon, small-arms, swords and bayonets, projectiles, powder, saltpetre, sulphur, military accoutrements, and everything made for use in war (*a*). Mr. Field, in his International Code, says, "Private property of any person whomsoever, and public property of a neutral nation are contraband of war, when consisting of articles manufactured for and primarily used for military purposes in time of war; and actually destined for the use of the hostile nation in war, but not otherwise" (*b*).

§ 501b. Classification of contraband goods. *The Peterhoff.*

The subject of contraband was discussed before the Supreme Court of America, in a case arising out of the shipment of contraband goods from England to Matamoras during the civil war. Matamoras is situated on the Mexican side of the Rio Grande, and was consequently a neutral port. The court said: "The classification of goods as contraband or not contraband has much perplexed text writers and jurists. A strictly accurate and satisfactory classification is perhaps impracticable; but that which is best supported by American and English decisions may be said to divide all merchandise into three classes. (1) Articles manufactured and primarily or ordinarily used for military purposes in time of war. (2) Articles which may be and are used for purposes of war or peace according to circumstances. (3) Articles exclusively used for peaceful purposes. Merchandise of the first class, destined to a belligerent country or places occupied by the army or navy of a belligerent, is always contraband; merchandise of the second class is contraband only when actually destined to the military or naval use of a belligerent; while merchandise of the third class is not contraband at all, though liable to seizure and condemnation for violation of blockade or siege" (*c*).

§ 501c. Ulterior destination of the goods.

A point arose in this case, upon which the courts of England and America have arrived at different conclusions. Matamoras, as has been said, was a Mexican and neutral port. At the time the ship was captured the United States had declared all the confederate ports blockaded, and a squadron cruised off the mouth of the Rio Grande to intercept the trade with Galveston, a place on the opposite side of the river to Matamoras, and in Confederate territory. The question then arose whether the whole river was blockaded, or whether the blockade only applied to the Confederate side of it. The Supreme Court held that a blockade is not to be extended by construction, and that as the United States authorities had not expressly declared the whole river blockaded (whether they had power to do so or not was another question), the Mexican side must be considered open to the commerce of neutrals. But with regard to the contraband on board the ship, the judgment proceeded as follows:—"Contraband merchandise is subject to a different rule in respect to ulterior destination than that which applies to merchandise not contraband. The latter is liable to capture

(*a*) [See Barboux, Jurisp. du Conseil des Prises, 1870—71, Appendix, Art. 8.]
(*b*) [Field, International Code, § 859.]
(*c*) [*The Peterhoff*, 5 Wallace, 58.]

only when a violation of blockade is intended; the former when destined to the hostile country, or to the actual military or naval use of the enemy, whether blockaded or not. The trade of neutrals with belligerents in articles not contraband is absolutely free, unless interrupted by blockade; the conveyance by neutrals to belligerents of contraband articles is always unlawful, and such articles may always be seized during transit at sea. Hence, while articles, not contraband, might be sent to Matamoras and beyond to the rebel region, where the communications were not interrupted by blockade, articles of a contraband character destined in fact to a State in rebellion, or for the use of the rebel military forces, were liable to capture though primarily destined to Matamoras" (*d*).

§ 501d. *Hobbs* v. *Henning.*

On the other hand the Court of Common Pleas, in a case arising in England out of the same voyage of the ship, came to the conclusion that goods contraband belonging to a neutral, are not liable to seizure unless in the actual prosecution of a voyage to an enemy's port. Nor is the rule affected by the fact that the shipper knows they are intended ultimately to reach an enemy's port (*e*).

It cannot be foreseen which of these decisions may be followed in the future (*f*), but it is evident that the American view materially increases the rights of belligerents, and adds another to the restrictions on neutral commerce during war. The case of *The Commercen* (*g*), cited in *The Peterhoff*, does not decide that contraband may be captured between two neutral ports with an ulterior destination for the enemy. Two wars then existed, one between England and the United States, another between England and France, carried on in Spain. *The Commercen* left Cork with a cargo of wheat, destined for the British fleet, then lying in a Spanish port, and she was captured by an American cruiser. The cargo was rightly held to be contraband under the circumstances. But it was condemned as enemy's property on its way to his fleet. Its destination to a neutral port was therefore not material. (*h*)

§ 501e. Contraband trade no breach of neutrality.

Some writers, overlooking the fact that a neutral has rights as well as a belligerent, have laid down the doctrine that the exportation of contraband is a breach of neutrality. This opinion has generally been adopted only by those whose views of international law are derived purely from speculation. The practice of nations in no way bears out such an assertion. In every war neutrals have traded in contraband, but with the risk of having the goods condemned if captured by the enemy (*i*). Few rules of international law are so certain as that a neutral government cannot be made responsible as for a breach of neutrality, because its subjects carry on a contraband trade. The trade must, however, be confined to subjects. If carried on by the govern-

(*d*) [*The Peterhoff*, 5 Wallace, 59.]

(*e*) [*Hobbs* v. *Henning*, 17 C. B. N. S. 791.]

(*f*) [Mr. Field, in his International Code, § 858, note, prefers the English view.]

(*g*) [1 Wheaton, 382. See *post*, § 507.]

(*h*) [The case of *The Vrow-Hewina*, decided in France, bears upon this point. Calvo, ii. § 1120.]

(*i*) [See Letters of Historicus, Contraband. Parl. Papers, N. America, 1873 (No. 2), p. 19; Turkey, 1878 (No. 1), p. 46.]

ment itself, it then will amount to a violation of neutral duties (*k*). America has always maintained the right of exporting arms to belligerents in the way of trade (*l*); and during the civil war the Federal Government purchased warlike stores from England to the value of over £2,000,000 (*m*).

§ 501f. Ships as contraband.

A ship, theoretically considered, may or may not be contraband. If on its way to a belligerent port for the purpose of being sold to the belligerent, it will be contraband if it is adapted, or readily adaptable, for warlike use; equally so, doubtless, if it be adapted for the transportation of troops, or even perhaps of military material. As most ships may in some way be applied to such purposes, they are pretty sure to be condemned as contraband. Thus, where the captain had orders to sell if he could find a good purchaser, but otherwise to seek freight, the ship was condemned (*n*).

§ 501g. Coals and machinery.

The immense importance of coals and machinery in the naval operations of the present day has given rise to endless discussions as to whether they are contraband or not. Writers of the school of M. Hautefeuille refuse to consider such commodities as contraband (*o*), and the French Government acted on this opinion during the war with Germany (*p*). Lord Chief Justice Cockburn says, "Coal, too, though in its nature *ancipitis usus*, yet when intended to contribute to the motive power of a vessel, must, I think, as well as machinery, be placed in the same category as masts and sails, which have always been placed among articles of contraband" (*q*).

§ 502. Transportation of military persons and despatches in the enemy's service.

Of the same nature with the carrying of contraband goods is the transportation of military persons or despatches in the service of the enemy.

A neutral vessel, which is used as a transport for the enemy's forces, is subject to confiscation, if captured by the opposite belligerent. Nor will the fact of her having been impressed by violence into the enemy's service, exempt her. The master cannot be permitted to aver that he was an involuntary agent. Were an act of force exercised by one belligerent power on a neutral ship or person to be considered a justification for an act, contrary to the known duties of the neutral character, there would be an end of any prohibition

(*k*) [Ortolan, Diplomatie de la Mer. vol. ii. cap. 6. Bluntschli, Le Droit International Codifié, § 765, p. 385.]

(*l*) [Kent, by Abdy, p. 361. Webster's Works, vol. vi. p. 452. President's Message to Congress. 1st Sess. 34th Cong.]

(*m*) [British Counter-case at Geneva. Parl. Papers, N. America (No. 4), 1872, p. 55.]

(*n*) [See American Law Review, vol. v. p. 371. *The Brutus*, 5 C. Rob. 331, n.]

(*o*) [Hautefeuille, Droits et Devoirs des Nations Neutres, vol. ii. p. 143.]

(*p*) [Archives Diplomatiques, 1871—72, Pt. I. p. 269.]

(*q*) [Parl. Papers, N. America, 1873 (No. 2), p. 15. *Jurist*, 1859, vol. v. Pt. II. p. 203.]

under the law of nations to carry contraband, or to engage in any other hostile act. If any loss is sustained in such a service, the neutral yielding to such demands must seek redress from the government which has imposed the restraint upon him (*r*). As to the number of military persons necessary to subject the vessel to confiscation, it is difficult to define; since fewer persons of high quality and character may be of much more importance than a much greater number of persons of lower condition. To carry a veteran general, under some circumstances, might be a much more noxious act than the conveyance of a whole regiment. The consequences of such assistance are greater, and therefore the belligerent has a stronger right to prevent and punish it; nor is it material, in the judgment of the Prize Court, whether the master be ignorant of the character of the service on which he is engaged. It is deemed sufficient if there has been an injury arising to the belligerent from the employment in which the vessel is found. If imposition is practised, it operates as force; and if redress is to be sought against any person, it must be against those who have, by means either of compulsion or deceit, exposed the property to danger; otherwise such opportunities of conveyance would be constantly used, and it would be almost impossible, in the greater number of cases, to prove the privity of the immediate offender (*s*).

§ 503. Fraudulently carrying contraband despatches.

The fraudulently carrying the despatches of the enemy will also subject the neutral vessel, in which they are transported, to capture and confiscation. The consequences of such a service are indefinite, infinitely beyond the effect of any contraband that can be conveyed. "The carrying of two or three cargoes of military stores," says Sir W. Scott, "is necessarily an assistance of a limited nature; but in the transmission of despatches may be conveyed the entire plan of a campaign, that may defeat all the plans of the other belligerent in that quarter of the world. It is true, as it has been said, that *one ball* might take off a Charles the XIIth, and might produce the most disastrous effects in a campaign; but that is a consequence so remote and accidental, that, in

(*r*) *The Carolina*, 4 C. Rob. 256.
(*s*) *The Orozembo*, 6 C. Rob. 430.

the contemplation of human events, it is a sort of evanescent quantity of which no account is taken; and the practice has been, accordingly, that it is in considerable quantities only that the offence of contraband is contemplated (*t*). The case of despatches is very different; it is impossible to limit a letter to so small a size as not to be capable of producing the most important consequences. It is a service, therefore, which, in whatever degree it exists, can only be considered in one character—as an act of the most hostile nature. The offence of fraudulently carrying despatches in the service of the enemy being, then, greater than that of carrying contraband under any circumstances, it becomes absolutely necessary, as well as just, to resort to some other penalty than that inflicted in cases of contraband. The confiscation of the noxious article which constitutes the penalty in contraband, where the vessel and cargo do not belong to the same person, would be ridiculous when applied to *despatches*. There would be *no* freight dependent on their transportation, and therefore this penalty could not, in the nature of things, be applied. The vehicle in which they are carried must, therefore, be confiscated" (*u*).

§ 504. Diplomatic despatches an exception.

But carrying the despatches of an ambassador or other public minister of the enemy, resident in a neutral country, is an exception to the reasoning on which the above general rule is founded. "They are despatches from persons who are, in a peculiar manner, the favourite object of the protection of the law of nations, residing in the neutral country for the purpose of preserving the relations of amity between that State and their own government. On this ground a very material distinction arises with respect to the right of furnishing the conveyance. The neutral country has a right to preserve its relations with the enemy, and you are not at liberty to conclude that any communication between them can partake, in any degree, of the nature of hostility against you. The limits assigned to the operations of war against ambassadors, by writers on public law, are, that the belligerent may exercise his right of war against them, wherever the

(*t*) [The French rules of 1870 directed the ship to be confiscated if more than three-fourths of the cargo consisted of contraband. Barboux, Jurisp. du Conseil des Prises, 1870—71. Appendix, Art. 6.]

(*u*) *The Atalanta*, 6 C. Rob. 440.

character of hostility exists: he may stop the ambassador of his enemy on his passage; but when he has arrived in the neutral country, and taken on himself the functions of his office, and has been admitted in his representative character, he becomes a sort of *middle man*, entitled to peculiar privileges, as set apart for the preservation of the relations of amity and peace, in maintaining which all nations are, in some degree, interested. If it be argued that he retains his national character unmixed, and that even his residence is considered as a residence in his own country, it is answered that this is a fiction of law, invented for his further protection only, and as such a fiction, it is not to be extended beyond the reasoning on which it depends. It was intended as a privilege, and cannot be urged to his disadvantage. Could it be said that he would, on that principle, be subject to any of the rights of war in the neutral territory? Certainly not: he is there for the purpose of carrying on the relations of peace and amity, for the interests of his own country primarily, but at the same time for the furtherance and protection of the interests which the neutral country also has in the continuance of those relations. It is to be considered also, with regard to this question, what may be due to the convenience of the neutral State; for its interests may require that the intercourse of correspondence with the enemy's country should not be altogether interdicted. It might be thought to amount almost to a declaration, that an ambassador from the enemy shall not reside in the neutral State, if he is declared to be debarred from the only means of communicating with his own. For to what useful purpose can he reside there without the opportunity of such a communication? It is too much to say that all the business of the two States shall be transacted by the minister of the neutral State resident in the enemy's country. The practice of nations has allowed to neutral States the privilege of receiving ministers from the belligerent powers, and of an immediate negotiation with them (*x*).

§ 504 a. The case of *The Trent*.

This subject was very exhaustively discussed in the celebrated case of *The Trent*. The facts of this case have been stated in a previous part of this work (*y*). It will be remembered that *The Trent* was a regular mail-steamer plying on her usual course from Havanna to Nassau.

(*x*) Sir W. Scott, in *The Caroline*, 6 C. Rob. 461.
(*y*) [See *ante*, § 109 b.]

Messrs. Slidell and Mason, the Confederate diplomatic agents, took their places on board at Havanna as ordinary passengers, and while the ship was on the high seas, she was stopped by a Federal ship-of-war, Slidell and Mason, with their secretaries, were taken out, and the vessel was then allowed to continue her voyage.

This case has raised the following question, which is thus stated by Professor Bernard, and left it unanswered : " Does a neutral ship forfeit that character, and expose itself to condemnation, by conveying, as passengers from one neutral port to another, persons going as diplomatic agents of the enemy to a neutral country ? The American government maintains the affirmative of this question—if not in all cases, at least in a case where the agent has not yet acquired an official character—and the community he is commissioned to represent has not been recognised as independent. It insists on the affirmative even where the ship is a regular packet, carrying mails, goods, and passengers, and making her regular voyage from and to her accustomed ports, the persons themselves taking their berths as ordinary passengers, and coming on board in the usual way. The British government maintains the negative, and other European governments appear to be of the same opinion, which is, I think, the sounder and more reasonable " (z).

§ 504b. The carriage of hostile persons. General rules.

Prof. Bernard also says on this subject, " The following propositions, though condensed, will be intelligible to lawyers. I state them with diffidence ; but they are, I believe, not far from the truth.

" 1. A neutral ship, conveying persons in the enemy's employment, whether military or civil, is not liable to condemnation as prize, unless on a consideration of all the circumstances, the court comes to the conclusion that she is serving the enemy as a transport, and so as to assist substantially, though perhaps not directly, his military operations.

" 2. If it be proved that the ship, though owned by a neutral, was actually hired for such a purpose by the enemy, it is immaterial whether the persons conveyed are many or few, important or insignificant, and whether the purpose of the hiring was or was not known by the master or owner. I understand by hiring any contract which gives the actual control and disposal of the ship to the enemy.

" 3. If, on the other hand, such a hiring by the enemy be not shown, it then becomes necessary to prove that the service performed was in its nature such as is rendered by a transport. The number of the persons conveyed, the nature of their employment, their importance, their immediate or ultimate destination, may then become material elements of proof ; and there should be evidence of intention, or of knowledge from which intention may be reasonably inferred, on the part of the owner, or his agent, the master.

" 4. It is incorrect, therefore, to speak of the conveyance of such persons, as if it were the same thing as the conveyance of ' contraband of war, or as if the same rules were applicable to it. It is a different thing, and the rules applicable to it are different.

" 5. The fact that the voyage is to end at a neutral port is not conclusive against condemnation, but is a strong argument against it, and

(z) [Montague Bernard, Neutrality of Great Britain, p. 223.]

would indeed be practically conclusive in most cases, especially if coupled with proof that the ship was pursuing her ordinary employment.

"6. It is not lawful, on the high seas, to take persons, whatever their character, as prisoners out of a neutral ship which has not been judicially proved to have forfeited the benefit of her neutral character" (*a*).

§ 505. Penalty for the carrying of contraband.

In general, where the ship and cargo do not belong to the same person, the contraband articles only are confiscated, and the carrier-master is refused his freight, to which he is entitled upon innocent articles which are condemned as enemy's property. But where the ship and the innocent articles of the cargo belong to the owner of the contraband, they are all involved in the same penalty. And even where the ship and the cargo do not belong to the same person, the carriage of contraband, under the fraudulent circumstances of false papers and false destination, will work a confiscation of the ship as well as the cargo. The same effect has likewise been held to be produced by the carriage of contraband articles in a ship, the owner of which is bound by the express obligation of the treaties subsisting between his own country and the capturing country, to refrain from carrying such articles to the enemy. In such a case, it is said that the ship throws off her neutral character, and is liable to be treated at once as an enemy's vessel, and as a violator of the solemn compacts of the country to which she belongs (*b*).

§ 506. The ship must be taken *in delicto*.

The general rule as to contraband articles, as laid down by Sir W. Scott, is that the articles must be taken *in delicto*, in the actual prosecution of the voyage to an enemy's port. "Under the present understanding of the law of nations, you cannot generally take the proceeds in the return voyage. From the moment of quitting port on a hostile destination, indeed, the offence is complete, and it is not necessary to wait till the goods are actually endeavouring to enter the enemy's port; but beyond that, if the goods are not taken *in delicto*, and in the actual prosecution of such a voyage, the penalty is not now generally held to attach (*c*)." But the same learned

(*a*) [Neutrality of Great Britain during American Civil War, p. 224.]

(*b*) *The Ringende Jacob*, 1 C. Rob. 91; *The Sarah Christina*, Ibid. 237; *The Mercurius*, ibid. 288; *The Franklin*, 3 Ibid. 217; *The Edward*, 4 Ibid. 69; *The Ranger*, 6 Ibid. 125; *The Neutralitet*, 3 Ibid. 295. [*Carrington* v. *Merchants' Ins. Co.*, 8 Peters, 518; *The Bermuda*, 3 Wallace, 557.] As to how far the shipowner is liable for the act of the master in cases of contraband, see Wheaton's Rep. vol. ii. Appendix, Note I. pp. 37, 38.

(*c*) *The Imina*, 3 C. Rob. 168.

judge applied a different rule in other cases of contraband, carried from Europe to the East Indies, with false papers and false destination, intended to conceal the real object of the expedition, where the return cargo, the proceeds of the outward cargo taken on the return voyage, was held liable to condemnation (*d*).

§ 507. American rule. *The Commercen.*

Although the general policy of the American government, in its diplomatic negotiations, has aimed to limit the catalogue of contraband by confining it strictly to munitions of war, excluding all articles of promiscuous use, a remarkable case occurred during the late war between Great Britain and the United States, in which the Supreme Court of the latter appears to have been disposed to adopt all the principles of Sir W. Scott, as to provisions becoming contraband under certain circumstances. But as that was not the case of a cargo of *neutral* property, supposed to be liable to capture and confiscation as contraband of war, but of a cargo of *enemy's* property going for the supply of the enemy's naval and military forces, and clearly liable to condemnation, the question was, whether the neutral master was entitled to his freight as in other cases of the transportation of innocent articles of enemy's property; and it was not essential to the determination of the case to consider under what circumstances articles *ancipitis usûs* might become contraband. Upon the actual question before the court, it seems there would have been no difference of opinion among the American judges in the case of an ordinary war; all of them concurring in the principle, that a neutral, carrying supplies for the enemy's naval or military forces, does, under the mildest interpretation of international law, expose himself to the loss of freight. But the case was that of a Swedish vessel, captured by an American cruiser, in the act of carrying a cargo of British property, consisting of barley and oats, for the supply of the allied armies in the Spanish peninsula, the United States being at war with Great Britain, but at peace

(*d*) *The Rosalie and Betty*, 2 C. Rob. 343; *The Nancy*, 3 Ibid. 122. The soundness of those last decisions may be well questioned; for in order to sustain the penalty, there must be, on principle, a *delictum* at the moment of seizure. To subject the property to confiscation whilst the offence no longer continues, would be to extend it indefinitely, not only to the return voyage, but to all future cargoes of the vessel, which would thus never be purified from the contagion communicated by the contraband articles.

with Sweden and the other powers allied against France. Under these circumstances a majority of the judges were of the opinion that the voyage was illegal, and that the neutral carrier was not entitled to his freight on the cargo condemned as enemy's property.

It was stated in the judgment of the court, that it had been solemnly adjudged in the British Prize Courts, that being engaged in the transport service of the enemy, or in the conveyance of military persons in his employment, or the carrying of despatches, are acts of hostility which subject the property to confiscation. In these cases, the fact that the voyage was to a neutral port was not thought to change the character of the transaction. The principle of these determinations was asserted to be, that the party must be deemed to place himself in the service of the enemy State, and to assist in warding off the pressure of the war, or in favouring its offensive projects. Now these cases could not be distinguished, in principle, from that before the court. Here was a cargo of provisions exported from the enemy's country, with the avowed purpose of supplying the army of the enemy. Without this destination, they would not have been permitted to be exported at all. It was vain to contend that the direct effect of the voyage was not to aid the British hostilities against the United States. It might enable the enemy indirectly to operate with more vigour and promptitude against them, and increase his disposable force. But it was not the effect of the particular transaction which the law regards: it was the general tendency of such transactions to assist the military operations of the enemy, and to tempt deviations from strict neutrality. The destination to a neutral port could not vary the application of this rule. It was only doing that indirectly which was directly prohibited. Would it be contended that a neutral might lawfully transport provisions for the British fleet and army, while it lay at Bordeaux preparing for an expedition to the United States? Would it be contended that he might lawfully supply a British fleet stationed on the American coast? An attempt had been made to distinguish this case from the ordinary cases of employment in the transport service of the enemy, upon the ground that the war of Great Britain against France was a war distinct from that against the United States; and that Swedish

subjects had a perfect right to assist the British arms in respect to the former though not to the latter. But the court held, that whatever might be the right of the Swedish sovereign, acting under his own authority, if a Swedish vessel be engaged in the actual service of Great Britain, or in carrying stores for the exclusive use of the British armies, she must, to all intents and purposes, be deemed a British transport. It was perfectly immaterial in what particular enterprise those armies might, at the time, be engaged; for the same important benefits were conferred upon the enemy of the United States, who thereby acquired a greater disposable force to bring into action against them. In *The Friendship* (*e*), Sir W. Scott, speaking on this subject, declared that "it signifies nothing, whether the men so conveyed are to be put into action on an immediate expedition or not. The mere shifting of drafts in detachments, and *the conveyance of stores* from one place to another, is an ordinary employment of a transport vessel, and it is a distinction totally unimportant whether this or that case may be connected with the *immediate active* service of the enemy. In removing forces from distant settlements, there may be no intention of immediate action; but still the general importance of having troops conveyed to places where it is convenient that they should be collected, either for present or future use, is what constitutes the object and employment of transport vessels." It was obvious that the learned judge did not deem it material to what places the stores might be destined; and it must be equally immaterial what is the immediate occupation of the enemy's force. That force was always hostile to America, be it where it might. To-day it might act against France, to-morrow against the former country; and the better its commissary department was supplied, the more life and activity was communicated to all its motions. It was not therefore material whether there was another distinct war, in which the enemy of the United States was engaged or not. It was sufficient, that his armies were everywhere their enemies; and every assistance offered to them must, directly or indirectly, operate to their injury.

The court was, therefore, of opinion that the voyage in which the vessel was engaged was illicit, and inconsistent with

(*e*) 6 C. Rob. 420.

the duties of neutrality, and that it was a very lenient administration of justice to confine the penalty to a mere denial of freight (*f*).

§ 508. Rule of the war of 1756.

It had been contended in argument in the above case, that the exportation of grain from Ireland being generally prohibited, a neutral could not lawfully engage in that trade during war, upon the principle of what has been called the "Rule of the War of 1756," in its application to the colonial and coasting trade of an enemy not generally open in time of peace. The court deemed it unnecessary to consider the principles on which that rule is rested by the British Prize Courts, not regarding them as applicable to the case in judgment. But the legality of the rule itself has always been contested by the American government, and it appears in its origin to have been founded upon very different principles from those which have more recently been urged in its defence. During the war of 1756, the French government, finding the trade with their colonies almost entirely cut off by the maritime superiority of Great Britain, relaxed their monopoly of that trade, and allowed the Dutch, then neutral, to carry on the commerce between the mother country and her colonies, under special licences or passes, granted for this particular purpose, excluding at the same time all other neutrals from the same trade. Many Dutch vessels so employed were captured by the British cruisers, and, together with their cargoes, were condemned by the Prize Courts, upon the principle, that by such employment they were in effect incorporated into the French navigation, having adopted the commerce and character of the enemy, and identified themselves with his interests and purposes. They were, in the judgment of these courts, to be considered like transports in the enemy's service, and hence liable to capture and condemnation, upon the same principle with property condemned for carrying military persons or despatches. In these cases the property was considered *pro hâc vice*, as enemy's property, as so completely identified with his interests as to acquire a hostile character. So, where a neutral is engaged in a trade, which is exclusively confined to the subjects of any country, in peace and in war, and is interdicted to all others, and cannot at any

(*f*) *The Commercen*, 1 Wheaton, 382.

time be avowedly carried on in the name of a foreigner, such a trade is considered so entirely national, that it must follow the hostile situation of the country (*g*). There is all the difference between this principle and the more modern doctrine which interdicts to neutrals, during war, all trade not open to them in time of peace, that there is between the granting by the enemy of special licenses to the subjects of the opposite belligerent, protecting their property from capture in a particular trade which the policy of the enemy induces him to tolerate, and a general exemption of such trade from capture. The former is clearly cause of confiscation, whilst the latter has never been deemed to have such an effect. The Rule of the War of 1756 was originally founded upon the former principle: it was suffered to lie dormant during the war of the American Revolution; and when revived at the commencement of the war against France in 1793, was applied, with various relaxations and modifications, to the prohibition of all neutral traffic with the colonies and upon the coasts of the enemy. The principle of the rule was frequently vindicated by Sir W. Scott, in his masterly judgments in the High Court of Admiralty and in the writings of other British public jurists of great learning and ability. But the conclusiveness of their reasonings was ably contested by different American statesmen, and failed to procure the acquiescence of neutral powers in this prohibition of their trade with the enemy's colonies. The question continued a fruitful source of contention between Great Britain and those powers, until they became her allies or enemies at the close of the war; but its practical importance will probably be hereafter much diminished by the revolution which has since taken place in the colonial system of Europe (*h*).

§ 508a. Continuous voyages.

The outbreak of war has always necessarily curtailed the usual operations of trade, and as a natural consequence merchants have continually endeavoured to avoid the operation of the laws of war, and to carry on trade rendering their goods liable to capture, with as little risk as possible. One of the chief artifices has been to send goods destined for a

(*g*) *The Princessa*, 2 C. Rob. 52; *The Anna Catherina*, 4 Ibid. 118; *The Rendsborg*, Ibid. 121; *The Vrow Anna Catherina*, 5 Ibid. 161. Wheaton's Rep. vol. ii. Appendix, p. 29.

(*h*) Wheaton's Rep. vol. i. Appendix, Note iii. See Madison's "Examination of the British doctrine which subjects to capture a neutral trade not open in time of peace."

belligerent, to some conveniently situated neutral port, first, with the intention of afterwards forwarding them to their ultimate destination. To sustain the rights of belligerents when this is done, Prize Courts have adopted what is called the principle of "continuous voyages." This has been explained as follows by Lord Stowell. He says, "It is an inherent and settled principle in cases in which the same question can have come under discussion, that the mere touching at any port *without importing the cargo into the common stock of the country*, will not alter the nature of the voyage, which continues the same in all respects, and must be considered as a voyage to the country to which the vessel is actually going for the purpose of delivering the cargo at the ultimate port" (*i*). But in Lord Stowell's time, and down to the American civil war, this doctrine had only been applied to cases covered by the rule of 1756, or where an underhand trade was attempted to be carried on by subjects of one belligerent with the enemy (*k*). During the civil war the Supreme Court, availing itself of Lord Stowell's language, applied the principle of continuous voyages to blockade running and the conveyance of contraband, and thus created a serious innovation in the law of prize. In the case of *The Bermuda*, which was captured on a voyage from England to Nassau, the court said, "Neutral trade is entitled to protection in our courts. Neutrals in their own country may sell to belligerents whatever belligerents choose to buy. The principal exceptions to this rule are, that neutrals must not sell to one belligerent what they refuse to sell to the other, and must not furnish soldiers or sailors to either; nor prepare, nor suffer to be prepared within their territory, armed ships or military or naval expeditions against either. So, too, except goods contraband of war, or conveyed with intent to violate a blockade, neutrals may transport to belligerents whatever belligerents may agree to take. And so, again, neutrals may convey in neutral ships from one neutral port to another, any goods, whether contraband of war or not, if intended for actual delivery at the port of destination, and to become part of the common stock of the country or of the port. . . . . But if it is intended to affirm (as was argued by counsel) that a neutral ship may take on a contraband cargo ostensibly for a neutral port, but destined in reality for a belligerent port, either by the same ship or by another, without becoming liable, from the commencement to the end of the voyage, to seizure, in order to the confiscation of the cargo, we do not agree to it. . . . . It makes no difference whether the destination to the rebel port was ulterior or direct; nor could the question of destination be affected by transhipment at Nassau, if transhipment was intended, for that could not break the continuity of transportation of the cargo.

§ 508 b. *The Bermuda.*

"The interposition of a neutral port, between neutral departure and belligerent destination, has always been a favourite resort of contraband carriers and blockade runners. But it never avails them when the ultimate destination is ascertained. A transportation from one point to

(*i*) [*The Maria*, 5 C. Rob. 368. And see *The Matchless*, 1 Hagg. Ad. 106; *The Jonge Pieter*, 4 C. Rob. 83; *The William*, 5 C. Rob. 385.]

(*k*) [Montague Bernard, Neutrality of Great Britain, p. 311. *The Ebenezer*, 6 C. Rob. 250; *The Thomyris*, Edw. 17.]

another remains continuous, so long as intent remains unchanged, no matter what stoppages or transhipments intervene" (*l*). Thus a vessel sailing from a neutral port, or a cargo sent from such a port, with intent to violate a blockade was held liable to condemnation from the very outset of the voyage, no matter to what intermediate ports the ship might go, provided the ulterior intent was ascertained (*m*). The case of *The Springbok* carried these principles to their furthest limit. She was on a *bonâ fide* voyage from London to Nassau, with a mixed cargo, consisting partly of contraband goods. While on the high seas and before arriving at Nassau, she was captured by a United States cruiser and taken to New York. The District Court condemned both ship and cargo as prize (*n*), but the Supreme Court reversed the decree as regards the ship, there being no sufficient proof that the destination of the cargo to a blockaded port was known to her owners (*o*).

The Springbok.

§ 508c. Difference between carriage by land and sea.

In these cases, when the ultimate destination was some Confederate seaport, there was no doubt that the ship and goods could be captured on their way from the interposed neutral port to the blockaded port. The innovation consisted in making the liability extend to the journey from the point of departure to the interposed port. A distinction, however, was made when the goods were finally to reach the belligerent by land. Thus the traffic between neutral States and Matamoras in Mexico (except in contraband), was held not to be any violation of the blockade, even if there were an intent to supply Texas through Matamoras. In this case the goods could only reach the Confederates by land, and a blockade by sea cannot give a belligerent any right to capture goods conveyed over land. The result was, that while the blockade lasted, neutral goods destined to reach the Confederates entirely by sea, whether in the same ship or another, were liable to seizure during the whole voyage, whereas if the last part of the journey was to be performed from a neutral place over land, the goods were not liable at all. If contraband, the goods were held liable whatever means of transport were adopted (*p*). It must be borne in mind that these new rules are at present only the law of the United States, and it remains to be seen whether they will be adopted by other countries in the next maritime war. It should be the tendency of international law to mitigate the effect of war as against neutral trade, but these decisions have just the contrary effect. Formerly neutral commerce was only interfered with when the goods were on their way directly from a neutral to a blockaded port, or when contraband was actually on its way to the belligerent. According to the doctrines laid down by the Supreme Court, neutrals might be seized almost anywhere on the ground that the ships or their cargoes were contraband or were ultimately destined to a blockaded port. Thus, suppose England and France were at war, and the British fleet blockaded Brest. If England

(*l*) [*The Bermuda*, 3 Wallace, 551.]

(*m*) [*The Circassian*, 2 Wallace, 135; *The Stephen Hart*, 3 Wallace, 559; *The Springbok*, 5 Wallace, 1.]

(*n*) [*The Springbok*, Blatchford, Prize Cases, 349.]

(*o*) [Ibid., 5 Wallace, 1. See Revue de Droit International, 1875, p. 241. Calvo, ii. § 1120. Quarterly Law Review, Nov. 1877.]

(*p*) [*The Peterhoff*, 5 Wallace, 35.]

adopted these rules, her cruisers might seize Italian or Dutch vessels on their way to New York, on the ground that the ulterior destination of the ship or cargo was Brest. Again, an Italian or Dutch ship on its way to Antwerp, with the intention of supplying Brest with goods over land could not be condemned, unless the goods were contraband (*q*).

§ 509. reach of ockade.

Another exception to the general freedom of neutral commerce in time of war, is to be found in the trade to ports or places besieged or blockaded by one of the belligerent powers.

The more ancient text writers all require that the siege or blockade should actually exist, and be carried on by an adequate force, and not merely declared by proclamation, in order to render commercial intercourse with the port or place unlawful on the part of neutrals. Thus Grotius forbids the carrying any thing to besieged or blockaded places, "*if* it might impede the execution of the belligerent's lawful designs, and if the carriers might have known of the siege or blockade; as in the case of a town actually invested, or a port closely blockaded, and when a surrender or peace is already expected to take place" (*r*). And Bynkershoek, in commenting upon this passage, holds it to be "unlawful to carry any thing, whether contraband or not, to a place thus circumstanced; since those who are within may be compelled to surrender, not merely by the direct application of force, but also by the want of provisions and other necessaries. If, therefore, it should be lawful to carry to them what they are in need of, the belligerent might thereby be compelled to raise the siege or blockade, which would be doing him an injury, and therefore unjust. And because it cannot be known what articles the besieged may want, the law forbids, in general terms, carrying *any thing* to them; otherwise disputes and altercations would arise to which there would be no end" (*s*).

(*q*) [See paper by Sir Travers Twiss read at the Antwerp Congress. Quarterly Law Review, Nov. 1877.]

(*r*) "*Si juris mei executionem rerum subvectio impediret, idque scire potuerit qui advexit, ut si* OPPIDUM OBSESSUM TENEBAM, *si* PORTUS CLAUSOS, *et jam deditio aut pax expectabatur*," &c. Grotius, de Jur. Bel. ac Pac. lib. iii. cap. 1, § 5, note 3.

(*s*) "Sola obsidio in causâ est, car nihil obsessis subvehere liceat, sive *contrabandum* sit, sive non sit, nam obsessi non tantum vi coguntur ad deditionem, sed et fame, et aliâ aliarum rerum penuriâ. Si quid eorum, quibus indigeat, tibi adferre liceret, ego fortè cogerer obsidionem solvere, et sic facto tuo mihi noceres, quod iniquum est. Quia autem scire nequit, quibus rebus obsessi indigeant, quibus abundent, omnis subvectio vetita est, alioquin altercationum nullus omnino esset modus vel finis. Hactenus Grotii sententiæ accedo, sed vellem ne ibidem addidisset, tunc demum id verum esse, *si jam deditio aut pax expectabatur*, ... nam nec rationi conveniunt, nec

§ 510. Opinion of Bynkershock on blockade.

Bynkershock appears to have mistaken the true sense of the above-cited passage from Grotius, in supposing that the latter meant to require, as a necessary ingredient in a strict blockade, that there should be an expectation of peace or of a surrender, when, in fact, he merely mentions that as an example, by way of putting the strongest possible case. But that he concurred with Grotius in requiring a strict and actual siege or blockade, such as where a town is actually invested with troops, or a port closely blockaded by ships of war (*oppidum obsessum, portus clausos*), is evident from his subsequent remarks in the same chapter, upon the decrees of the States-General against those who should carry any thing to the Spanish camp, the same not being then actually besieged. He holds the decrees to be perfectly justifiable, so far as they prohibited the carrying of contraband of war to the enemy's camp; "but, as to other things, whether they were or were not lawfully prohibited, depends entirely upon the circumstance of the place being besieged or not." So also, in commenting upon the decree of the States-General of the 26th June, 1630, declaring the ports of Flanders in a state of blockade, he states that this decree was for some time not carried into execution by the actual presence of a sufficient naval force, during which period certain neutral vessels trading to those ports were captured by the Dutch cruisers; and that part of their cargoes only which consisted of contraband articles was condemned, whilst the residue was released with the vessels. "It has been asked," says he, "by what law the contraband goods were condemned under those circumstances, and there are those who deny the legality of their condemnation. It is evident, however, that whilst those coasts were guarded in a lax or remiss manner, the law of blockade, by which all neutral goods going to or coming from a blockaded port may be lawfully captured, might also have been relaxed; but not so the general law of war, by which contraband goods, when carried to an enemy's port, even though not blockaded, are liable to confiscation" (*t*).

pactis Gentium, quæ mihi succurrerunt. Quæ ratio me arbitrum constituit de futurâ deditione aut pace? et, si neutra expectetur, jam licebit obsessis quælibet advehere? imo nunquam licet, durante obsidione, et amici non est causam amici perdere, vel quoque modo deteriorem facere." Bynkershock, Quæst. Jur. Pub. lib. i. cap. 11.

(*t*) Wheaton's Hist. of Law of Nations, pp. 138—143.

§ 510a. Legal aspect of blockade running and conveying contraband.

The law of blockade like that of contraband is a compromise between the conflicting rights of belligerents and neutrals, viz., the right of the former to injure his foe so as to compel him to give up the struggle, and the right of the latter to carry on his usual trade with that foe. It is often said that the violation of a blockade and the transportation of contraband are unlawful, but this requires some explanation. If by this expression it is intended to imply that such acts are contrary to international law, in the sense of being criminal or as being acts of disobedience to a positive rule, the term unlawful is then wrongly used. Neutral subjects are under no positive duty imposed by the law of nations, to abstain from blockade running, or from carrying contraband. The acts which amount to this in time of war, are perfectly lawful in time of peace, but the existence of war gives to the belligerents certain rights which they may enforce against the neutrals who engage in these two transactions. Thus the exportation of a cargo of arms to any State during peace is indisputably lawful, and it is also in a certain sense not unlawful when the State to which the arms are consigned is at war, but in this case the sender is exposed to the risk of forfeiting his goods if the other belligerent can capture them on their way. So it is with blockade. Its violation only exposes the blockade runner to the chance of losing his ship and cargo, if he is unsuccessful. It is no violation of neutrality for a State not to prevent its subjects from engaging in such traffic; its duty as a neutral consists in letting them do so at their own risk, and abandoning them to the prize courts of the belligerent who may capture them (*u*). Proclamations of neutrality usually inform subjects that if they engage in blockade running or the carriage of contraband they "will rightfully incur, and be justly liable to, hostile capture, and to the penalties denounced by the law of nations in that behalf" (*x*). Thus these two transactions are only unlawful in the sense that the belligerent may inflict the punishment of confiscation if he can catch the perpetrators in the act. When the act is completed no penalty can be imposed; the responsibility for it ceases on completion (*y*). In the foregoing remarks it is assumed that the neutral States have not enacted any municipal law expressly prohibiting blockade running, &c., and that they are not bound by any treaty stipulations on the subjects. The matter is here discussed only from the point of view of international law unrestricted by any special arrangement (*z*).

§ 510b. Sieges and blockades.

There is an important distinction between sieges and blockades. The former are as a rule undertaken with the object of capturing the place besieged, while the usual object of the latter is to cripple the resources of the enemy by intercepting his commerce with neutral States (*a*).

(*u*) [Parl. Papers, N. America, 1873 (No. 2), p. 109.]

(*x*) [Proc. of 13th May, 1859, relating to French Austrian war. See Rep. of Neutrality Laws Commission, 1868, p. 74; and see there other proclamations.]

(*y*) [*The Helen*, L. R. 1 A. & E. 1; *Ex parte Chavasse*, 11 Jur. N. S. 400; *Naylor* v. *Taylor*, 9 B. & C. 718.]

(*z*) [See on this subject Parl. Papers, N. America, 1873 (No. 2), p. 14. Letters of Historicus: Contraband.]

(*a*) [Duer on Insurance, vol. i. lect. 7, § 32.]

A city may, and often is, both besieged and blockaded at the same time (*b*). It is thus evident that neutral States suffer to a great extent from a blockade, and such an undertaking has been described as "*la plus grave atteinte qui puisse être portée par la guerre au droit des neutres*" (*c*).

§ 510c. Extent of blockades.

A blockade being thus an infringement of neutral rights, its operation is not to be extended further than the actual circumstances of the case render it necessary. Thus when the United States declared all the Southern ports blockaded, and a squadron cruised off the mouth of the Rio Grande to intercept the trade with Texas, the Supreme Court decided that this blockade was not to be held to apply to the western side of the Rio Grande, which was in Mexican and neutral territory (*d*). A blockade must also be absolute, that is, it must interdict all commerce whatever with the blockaded port. It is not legitimate if it allows to either belligerent a freedom of commerce denied to the subjects of neutral States. During the Crimean war various orders were issued by the English, French, and Russian governments, the effect of which was to permit trade to be carried on by their respective subjects in the Baltic ports, while those ports were blockaded by the English and French fleets, but which excluded neutrals from such trade. During this blockade a Danish (and neutral) ship was captured by an English cruiser near the entrance of the Gulf of Riga. The Privy Council held that as the blockade was relaxed in favour of belligerents to the exclusion of neutrals, it was not a legal blockade, and therefore the vessel was improperly seized for attempting to enter the port of Riga, and must be restored (*e*).

The Franciska.

§ 511. What things must be proved to constitute a violation of blockade.

"To constitute a violation of blockade," says Sir W. Scott, "three things must be proved: 1st. The existence of an actual blockade; 2ndly. The knowledge of the party supposed to have offended; and 3rdly. Some act of violation, either by going in or coming out with a cargo laden after the commencement of blockade (*f*)."

§ 512. Actual presence of the blockading force.

1. The definition of a lawful maritime blockade, requiring the actual presence of a maritime force stationed at the entrance of the port, sufficiently near to prevent communication, as given by the text writers, is confirmed by the authority of numerous modern treaties, and especially by the Convention of 1801, between Great Britain and Russia, intended as a final adjustment of the disputed points of maritime law,

(*b*) [Calvo, ii. § 1139.]
(*c*) [Cauchy, tom. ii. p. 196. See also Flore, tom. ii. p. 446.]
(*d*) [*The Peterhoff*, 5 Wallace, 35; *The Frau Ilsabe*, 4 C. Rob. 63; *The Luna*, Edw. 190.]
(*e*) [*The Franciska* (*Northcote* v. *Douglas*), 10 Moo. P. C. 36.]
(*f*) *The Betsey*, 1 C. Rob. 92.

which had given rise to the armed neutrality of 1780 and of 1801 (*g*).

§ 513. Temporary interruption.

The only exception to the general rule, which requires the actual presence of an adequate force to constitute a lawful blockade, arises out of the circumstance of the occasional temporary absence of the blockading squadron, produced by accident, as in the case of a storm, which does not suspend the legal operation of the blockade. The law considers an attempt to take advantage of such an accidental removal a fraudulent attempt to break the blockade (*h*).

§ 513a. Efficiency of blockades.

The fourth article of the Declaration of Paris, 1856, is as follows:—"Blockades, in order to be binding, must be effective, that is to say, maintained by a force sufficient really to prevent access to the coast of the enemy" (*i*). This merely puts into a formula what was already a principle of the law of nations, but it leaves the often disputed question of what is a "sufficient force" in the same state as before. This is, in reality, more a question of fact than of law, and it seems almost impossible to lay down any precise rule defining in all cases what is a sufficient force (*k*). "In the eye of the law," said Lord Chief Justice Cockburn, "a blockade is effective if the enemy's ships are in such numbers and positions as to render running the blockade a matter of danger, although some vessels may succeed in getting through" (*l*). A blockade is not necessarily confined to maritime operations. It may be made effectual by batteries ashore as well as by ships afloat. In the case of an inland port, the most effective blockade would be maintained by batteries commanding the river or inlet by which it may be approached, supported by a naval force sufficient to warn off innocent and capture offending vessels attempting to enter (*m*). The blockade of the Confederate ports by the United States was one of the most extraordinary in history. It extended over a coast line of more than 3000 miles, and though, at the outset, the Federal fleet was not equal to such a gigantic task, foreign governments recognised the blockade. As the war progressed the development of the naval resources of the Northern States enabled them to intercept most of the trade with the South, and this was one of the chief causes of their ultimate success (*n*). The Supreme Court held that this extensive blockade being once established, and duly notified, it was to be deemed to continue until notice of discontinuance, in

(*g*) The 3rd art. sect. 4, of this convention, declares:—"That in order to determine what characterises a blockaded port, that domination is given only where there is, by the disposition of the power which attacks it with ships stationary, or sufficiently near, an evident danger in entering."

(*h*) *The Columbia*, 1 C. Rob. 154.

(*i*) [Hertslet, Map of Europe, vol. ii. p. 1283.]

(*k*) [Calvo, ii. § 1148. Bluntschli, § 829.]

(*l*) [*Geipel* v. *Smith*, L. R. 7 Q. B. 410.]

(*m*) [*The Circassian*, 2 Wallace, 149.]

(*n*) [Wheaton by Dana, note 232.]

the absence of positive proof of discontinuance by other evidence. Thus ships captured for endeavouring to enter or leave the Confederate ports were condemned as prize when their officers saw, or swore they saw, no blockading ships off the ports they were making for or quitting (*o*). A milder rule towards neutrals was adopted by France in 1870. French naval officers were instructed that ships approaching a blockaded port were not to be deemed to intend violating the blockade, until its notification had been inscribed on their register or ship's papers, by an officer of one of the ships forming the blockade (*p*).

§ 513b. Turkish blockade of the Black Sea.

A question respecting the efficiency of a blockade arose during the present Turco-Russian war. Turkey proclaimed a blockade of the whole of the coasts of the Black Sea, from Trebizond to the mouth of the Danube, and maintained it by a force of cruisers in the Black Sea itself. This force prevented most of the trade with the Russian ports from being carried on; but, besides this, the Porte stationed two cruisers in the Bosphorus, and any vessels which escaped the Black Sea squadron were captured on arriving there, and taken before the Prize Court, sitting at Constantinople. A more complete and efficient blockade could not possibly be devised, nevertheless it was argued for the owners of the prizes, that being neutral vessels (mostly Greek), as soon as they had escaped the Black Sea squadron, they were free, and were no longer liable to capture. The Turkish Prize Court, however, condemned the vessels. This case was peculiarly important from the fact that some of the foreign ambassadors at the Porte had intimated that if these vessels were not condemned, the blockade would not be recognised by other countries. To hold that these Greek vessels were not liable to be captured in the Bosphorus, would have been tantamount to opening the general commerce of the Black Sea to Greece, and this would have immediately invalidated the whole blockade (*q*).

§ 514. Knowledge of the party.

2. As a proclamation, or general public notification, is not of itself sufficient to constitute a legal blockade, so neither can a knowledge of the existence of such a blockade be imputed to the party, *merely* in consequence of such a proclamation or notification. Not only must an actual blockade exist, but a knowledge of it must be brought home to the party, in order to show that it has been violated (*r*). As, on the one hand, a declaration of blockade which is not supported by the fact cannot be deemed legally to exist, so, on the other hand, the fact, duly notified to the party on the spot, is of itself sufficient to affect him with a knowledge of it; for the public notifica-

(*o*) [*The Baigorry*, 2 Wallace, 480; *The Andromeda*, Ibid. p. 481.]
(*p*) [See Instructions, art. 7. Barboux, Jurisp. du Conseil des Prises, 1870—71, Appendix.]
(*q*) [See the *Times*, 15th Dec. 1877, p. 6.]
(*r*) *The Betsey*, 1 C. Rob. 93.

tions between governments can be meant only for the information of individuals; but if the individual is personally informed, that purpose is still better obtained than by a public declaration (*s*). Where the vessel sails from a country lying sufficiently near to the blockaded port to have constant information of the state of the blockade, whether it is continued or is relaxed, no special notice is necessary; for the public declaration in this case implies notice to the party, after sufficient time has elapsed to receive the declaration at the port whence the vessel sails (*t*). But where the country lies at such a distance that the inhabitants cannot have this constant information, they may lawfully send their vessels conjecturally, upon the expectation of finding the blockade broken up, after it has existed for a considerable time. In this case, the party has a right to make a fair inquiry whether the blockade be determined or not, and consequently cannot be involved in the penalties affixed to a violation of it, unless, upon such inquiry, he receives notice of the existence of the blockade (*u*).

§ 515. Constructive or presumed knowledge.

"There are," says Sir W. Scott, "two sorts of blockade: one by the *simple fact* only, the other by a notification accompanied with the fact. In the former case, when the fact ceases otherwise than by accident, or the shifting of the wind, there is immediately an end of the blockade; but where the fact is accompanied by a public notification from the government of a belligerent country to neutral governments, I apprehend, *primâ facie*, the blockade must be supposed to exist till it has been publicly repealed. It is the duty, undoubtedly, of a belligerent country, which has made the notification of blockade, to notify in the same way, and immediately, the discontinuance of it; to suffer the fact to cease, and to apply the notification again at a distant time, would be a fraud on neutral nations, and a conduct which we are not to suppose that any country would pursue. I do not say that a blockade of this sort may not, in any case, expire *de facto*; but I say that such a conduct is not hastily to be presumed against any nation; and, therefore, till such a case is clearly made out, I shall hold that a blockade by

(*s*) *The Mercurius*, 1 C. Rob. 83.
(*t*) *The Jonge Petronella*, 2 C. Rob. 131. *The Calypso*, Ibid 298.
(*u*) *The Betsey*, 1 C. Rob. 332.

notification is, *primâ facie*, to be presumed to continue till the notification is revoked" (*u*). And in another case he says:—"The effect of a notification to any foreign government would clearly be to include all the individuals of that nation; it would be nugatory, if individuals were allowed to plead their ignorance of it; it is the duty of foreign governments to communicate the information to their subjects, whose interests they are bound to protect. I shall hold, therefore, that a neutral master can never be heard to aver against a notification of blockade that he is ignorant of it. If he is really ignorant of it, it may be subject of representation to his own government, and may raise a claim of compensation from them, but it can be no plea in the court of a belligerent. In the case of a blockade *de facto* only, it may be otherwise; but this is a case of a blockade by notification. Another distinction between a notified blockade and a blockade existing *de facto* only, is, that in the former the act of sailing for a blockaded place is sufficient to constitute the offence. It is to be presumed that the notification will be formally revoked, and that due notice will be given of it; till that is done, the port is to be considered as closed up, and from the moment of quitting port to sail on such a destination, the offence of violating the blockade is complete, and the property engaged in it subject to confiscation. It may be different in a blockade existing *de facto* only; there no presumption arises as to the continuance, and the ignorance of the party may be admitted as an excuse for sailing on a doubtful and provisional destination" (*x*).

§ 515a. Simple and public blockades.

In the case of a simple blockade, the captors are bound to prove its existence at the time of capture; while in the case of a public blockade, the claimants are held liable to proof of discontinuance, in order to protect themselves from the penalties of alleged violation (*y*). In the case of a public blockade, a ship hovering near a blockaded port cannot say she was going to the blockading squadron to ask for authority to continue her voyage (*z*).

§ 515b. Extent of notice.

"A notice of blockade," says Prof. Bernard, "must not be more extensive than the blockade itself. A belligerent cannot be allowed to proclaim that he has instituted a blockade of all the ports of the enemy,

(*u*) *The Neptunus*, 1 C. Rob. 171.
(*x*) *The Neptunus, Hempel*, 2 C. Rob. 112.
(*y*) [*The Circassian*, 2 Wallace, 150.]
(*z*) [*The Admiral*, 3 Wallace, 603; *The Josephine*, Ibid. 83; *The Cheshire*, Ibid. 231.]

within certain specified limits, when in truth he has only blockaded some of them. Such a course would introduce all the evils of what is termed a 'paper blockade,' and would be attended with the grossest injustice to the commerce of neutrals. Accordingly, a neutral is at liberty to disregard such a notice, and is not liable to the penalties attending a breach of blockade for afterwards attempting to enter one of the ports which really are blockaded" (*a*).

§ 516. Treaty stipulations as to notice.

A more definite rule as to the notification of an existing blockade has been frequently provided by conventional stipulations between different maritime powers. Thus by the 18th article of the treaty of 1794, between Great Britain and the United States, it was declared—"That whereas it frequently happens that vessels sail for a port or place belonging to an enemy, without knowing that the same is either besieged, blockaded, or invested, it is agreed that every vessel so circumstanced may be turned away from such port or place; but she shall not be detained, nor her cargo, if not contraband, be confiscated, unless, after notice, she shall again attempt to enter; but she shall be permitted to go to any other port or place she may think proper." This stipulation, which is equivalent to that contained in previous treaties between Great Britain and the Baltic powers, having been disregarded by the naval authorities and prize courts in the West Indies, the attention of the British government was called to the subject by an official communication from the American government. In consequence of this communication, instructions were sent out in the year 1804, by the Board of Admiralty, to the naval commanders and judges of the vice-admiralty courts, not to consider any blockade of the French West-India islands as existing, unless in respect to particular ports which were actually invested; and then not to capture vessels bound to such ports, unless they should previously have been warned not to enter them. The stipulation in the treaty intended to be enforced by these instructions seems to be a correct exposition of the law of nations, and is admitted by the contracting parties to be a correct exposition of that law, or to constitute a rule between themselves in place of it. Neither the law of nations nor the treaty admits of the condemnation

(*a*) [Montague Bernard, Neutrality of Gt. Britain, p. 231. *Northcote* v. *Douglas* (*The Franciska*), 10 Moo. P. C. 37]

of a neutral vessel for the mere intention to enter a blockaded port, unconnected with any fact. In the above-cited cases, the fact of sailing was coupled with the intention, and the condemnation was thus founded upon a supposed actual breach of the blockade. Sailing for a blockaded port, knowing it to be blockaded, was there construed into an attempt to enter that port, and was, therefore, adjudged a breach of blockade from the departure of the vessel. But the fact of clearing out for a blockaded port is, in itself, innocent, unless it be accompanied with a knowledge of the blockade. The right to treat the vessel as an enemy, is declared by Vattel (liv. iii. sect. 177) to be founded on the *attempt* to enter; and certainly this attempt must be made by a person knowing the fact. The import of the treaty, and of the instructions issued in pursuance of the treaty, is, that a vessel cannot be placed in the situation of one having a notice of the blockade, until she is warned off. They gave her a right to inquire of the blockading squadron, if she had not previously received this warning from one capable of giving it, and consequently dispensed with her making that inquiry elsewhere. A neutral vessel might thus lawfully sail for a blockaded port, knowing it to be blockaded; and being found sailing towards such a port would not constitute an attempt to break the blockade, unless she should be actually warned off (*b*).

§ 517. Blockading force driven off by hostile attack.

Where an enemy's port was declared in a state of blockade by notification, and at the same time when the notification was issued, news arrived that the blockading squadron had been driven off by a superior force of the enemy, the blockade was held by the Prize Court to be null and defective from the beginning, in the main circumstance that is essentially necessary to give it legal operation; and that it would be unjust to hold neutral vessels to the observance of a notification, accompanied by a circumstance that defeated its effect. This case was, therefore, considered as independent of the presumption arising from notification in other instances; the notification being defeated, it must have been shown that the actual blockade was again resumed, and the vessel would have

(*b*) *Fitzsimmons* v. *The Newport Insurance Company*, 4 Cranch, 185. Mr. Merry's Letter to Mr. Secretary Madison, 12th April, 1804. Wheaton's Rep. vol. iii. Appendix, p. 11.

been entitled to a warning, if any such blockade had existed when she arrived off the port. The mere act of sailing for the port, under the dubious state of the actual blockade at the time, was deemed insufficient to fix upon the vessel the penalty for breaking the blockade (*c*).

§ 518. New notice necessary in such a case.

In the above case, a question was raised whether the notification which had issued was not still operative; but the court was of opinion that it could not be so considered, and that a neutral power was not obliged, under such circumstances, to presume the continuance of a blockade, nor to act upon a supposition that the blockade would be resumed by any other competent force. But in a subsequent case, where it was suggested that the blockading squadron had actually returned to its former station off the port, in order to renew the blockade, a question arose whether there had been that notoriety of the fact, arising from the operation of time, or other circumstances, which must be taken to have brought the existence of the blockade to the knowledge of the parties. Among other modes of resolving this question, a prevailing consideration would have been the length of time, in proportion to the distance of the country from which the vessel sailed. But as nothing more came out in evidence than that the squadron came off the port on a certain day, it was held that this would not restore a blockade which had been thus effectually raised, but that it must be renewed again by notification, before foreign nations could be affected with an obligation to observe it. The squadron might return off the port with different intentions. It might arrive there as a fleet of observation merely, or for the purpose of only a qualified blockade. On the other hand, the commander might attempt to connect the two blockades together; but this is what could not be done; and, in order to revive the former blockade, the same form of communication must have been observed *de novo* that is necessary to establish an original blockade (*d*).

§ 519. Some act of violation necessary.

3. Besides the knowledge of the party, some act of violation is essential to a breach of blockade; as either going in

(*c*) *The Triheten*, 6 C. Rob. 65.
(*d*) *The Hoffnung*, Ibid. 112.

or coming out of the port with a cargo laden after the commencement of the blockade (*e*).

Thus, by the edict of the States-General of Holland, of 1630, relative to the blockade of the ports of Flanders, it was ordered that the vessels and goods of neutrals which should be found going in or coming out of the said ports, or so near thereto as to show beyond a doubt that they were endeavouring to run into them; or which, from the documents on board, should appear bound to the said ports, although they should be found at a distance from them, should be confiscated, unless they should, voluntarily, before coming in sight of or being chased by the Dutch ships of war, change their intention, while the thing was yet undone, and alter their course. Bynkershoek, in commenting upon this part of the decree, defends the reasonableness of the provision which affects vessels *found so near to the blockaded ports as to show beyond a doubt that they were endeavouring to run into them*, upon the ground of legal presumption, with the exception of extreme and well-proved necessity only. Still more reasonable is the infliction of the penalty of confiscation, where the intention is expressly avowed by the papers found on board. The third article of the same edict also subjected to confiscation such vessels and their cargoes as should come out of the said ports, not having been forced into them by stress of weather, although they should be captured at a distance from them, unless they had, after leaving the enemy's port, performed their voyage to a port of their own country, or to some other neutral or free port, in which case they should be exempt from condemnation; but if, in coming out of the said ports of Flanders, they should be pursued by the Dutch ships of war, and chased into another port, such as their own, or that of their destination, and found on the high seas coming out of *such port*, in that case they might be captured and condemned. Bynkershoek considers this provision as distinguishing the case of a vessel having broken the blockade, and afterwards terminated her voyage by proceeding voluntarily to her destined port, and that of a vessel chased and compelled to take refuge; which latter might still be captured after leaving the

(*e*) *The Betsey*, 1 C. Rob. 93.

port in which she had taken refuge. And in conformity with these principles are the more modern law and practice (*f*).

§ 519a. Intent to violate blockade.

The mere intention to violate a blockade is not a sufficient ground for condemnation; the intention must be coupled with some act showing an attempt to enter the port (*g*). It is not the mere mental design that subjects the goods to confiscation, but the overt act of starting for, or proceeding towards, the prohibited port with the knowledge that it is blockaded, and continuing that course up to the time of capture (*h*). The intent, however, must exist in order to constitute the *delictum*, and it must be gathered from the circumstances of each case. It may be inferred from the bills of lading, the letters and papers on board, the acts and words of the owners and charterers, or the spoliation of papers. Delay in sailing after complete loading, or a change of course in order to avoid a man-of-war, afford good grounds for suspicion (*i*). Every dissemblance in the ship's papers will be regarded as intended to conceal what could not safely be disclosed, and to afford evidence that the destination of the vessel is falsified (*k*). The circumstance that the master was also master of a ship condemned before, will be noticed by the Court (*l*). But if the intention be *bonâ fide* abandoned at the time of capture, the ship will not be condemned; only in this case very clear and satisfactory proof of a complete abandonment of the intent will be required (*m*). Since a blockade exposes ships intending to enter the port to the risk of confiscation, a shipowner who before the blockade contracted to carry goods to the port (unless restrained by princes, &c.), is entitled to throw up his contract when the port becomes blockaded (*n*).

§ 519b. Justifiable entry into a blockaded port.

The stringency of the rule prohibiting vessels from entering a blockaded port is only relaxed when the ship attempting to enter does so from reasons of necessity. She may be out of provisions or water, or she may be in a leaking condition, and no other port be of easy access. The case, however, must be one of absolute and uncontrollable necessity; and this must be established beyond reasonable doubt. "Nothing less," says Lord Stowell, "than an uncontrollable necessity, which admits of no compromise, and cannot be resisted," will be held a justification of the offence. Any rule less stringent than this would open the door to all sorts of fraud. Attempted evasions of the blockade

(*f*) Bynkershoek, Quæst. Jur. Pub. lib. i. cap. 11. *The Welvaart Van Pillaw*, 2 C. Rob. 138; *The Juffrow Maria Schroeder*, 3 C. Rob. 147.

(*g*) [*Fitzsimmons* v. *Newport Ins. Co.*, 4 Cranch, 199.]

(*h*) [*The John Gilpin*, Blatchford, Prize Cases, 291, Halleck, ch. 23, § 23. *Yeaton* v. *Fry*, 9 Cranch, 446.]

(*i*) [*The Circassian*, 2 Wallace, 135; *The Bargorry*, Ibid. 474; *The Andromeda*, Ibid. 482; *The Cornelius*, 3 Wallace, 214.]

(*k*) [*The Louisa Agnes*, Blatchford, Prize Cases, 112; *The Mentor*, Edw. 207.]

(*l*) [*The Diana*, 7 Wallace, 360; *The William H. Northrop*, Blatchford, Prize Cases, 235.]

(*m*) [*The John Gilpin*, Blatchford, Prize Cases, 291.]

(*n*) [*Geipel* v. *Smith*, L. R. 7 Q. B. 404.]

would be excused upon pretences of distress and danger not warranted by the facts, but the falsity of which it would be difficult to expose (*o*).

§ 519c. Cargo on ship condemned for breach of blockade.

The general, but not the universal rule, is, that when a ship is condemned for breach of blockade the cargo follows the same fate. The owners of the cargo are concluded by the act of the master, even though the breach of blockade was without their privity, or contrary to their wishes. When the owners of the cargo knew, or might have known, of the existence of the blockade when the shipment was made, the inference of law is irresistible that they were privy to violating the blockade. The master is to be treated as the agent for the cargo as well as for the ship (*p*).

§ 520. Violation of blockade by egress.

With respect to violating a blockade by coming out with a cargo, the time of shipment is very material; for although it might be hard to refuse a neutral liberty to retire with a cargo already laden, and by that act already become neutral property; yet, after the commencement of a blockade, a neutral cannot be allowed to interpose, in any way, to assist the exportation of the property of the enemy (*q*). A neutral ship departing can only take away a cargo *bonâ fide* purchased and delivered before the commencement of the blockade; if she afterwards take on board a cargo, it is a violation of the blockade. But where a ship was transferred from one neutral merchant to another in a blockaded port, and sailed out in ballast, she was determined not to have violated the blockade (*r*). So where goods were sent into the blockaded port before the commencement of the blockade, but reshipped by order of the neutral proprietor, as found unsaleable, during the blockade, they were held entitled to restitution. For the same rule which permits neutrals to withdraw their vessels from a blockaded port extends also, with equal justice, to merchandise sent in before the blockade, and withdrawn *bonâ fide* by the neutral proprietor (*s*).

§ 521. Purchase of goods in a blockaded port.

After the commencement of a blockade, a neutral is no longer at liberty to make any purchase in that port. Thus, where a ship which had been purchased by a neutral of the

(*o*) [*The Diana*, 7 Wallace, 369; *The Major Barbour*, Blatchford, Prize Cases, 167; *The Forest King*, Ibid. 2; *The Panaghia Rhomba*, 12 Moo. P. C. 168.]

(*p*) [*The Panaghia Rhomba* (*Baltazzi* v. *Ryder*), 12 Moo. P. C. 168.]

(*q*) *The Betsey*, 1 C. Rob. 93.

(*r*) *The Vrow Judith*, Ibid. 150.

(*s*) *The Potsdam*, 4 C. Rob. 89; *Olivera* v. *Union Insurance Company*, 3 Wheaton, 183.

enemy in a blockaded port, and sailed on a voyage to the neutral country, had been driven by stress of weather into a belligerent port, where she was seized, she was held liable to condemnation under the general rule. That the vessel had been purchased out of the proceeds of the cargo of another vessel, was considered as an unavailing circumstance on a question of blockade. If the ship has been purchased in a blockaded port, *that* alone is the illegal act, and it is perfectly immaterial out of what funds the purchase was effected. Another distinction taken in argument was, that the vessel had terminated her voyage, and therefore that the penalty would no longer attach. But this was also overruled, because the port into which she had been driven was not represented as forming any part of her original destination. It was therefore impossible to consider this accident as any discontinuance of the voyage, or as a defeasance of the penalty which had been incurred (*t*).

§ 522. Interior canal navigation.

A maritime blockade is not violated by sending goods to the blockaded port, or by bringing them from the same, through the interior canal navigation or land carriage of the country. A blockade may be of different descriptions. A mere maritime blockade, effected by a force operating only at sea, can have no operation upon the interior communications of the port. The legal blockade can extend no further than the actual blockade can be applied. If the place be not invested on the land side, its interior communications with other ports cannot be cut off. If the blockade be rendered imperfect by this rule of construction, it must be ascribed to its physical inadequacy, by which the extent of its legal pretensions is unavoidably limited (*u*). But goods shipped in a river, having been previously sent in lighters along the coast from the blockaded port, with the ship under charter-party proceeding also from the blockaded port in ballast to take them on board, were held liable to confiscation. This case is very different from the preceding, because there the communication had been by inland navigation, which was in no manner and in no part of it subject to the blockade (*x*).

(*t*) *The Juffrow Maria Schroeder*, 4 C. Rob. note.
(*u*) *The Comet*, Edw. Ad. 32; [*The Peterhoff*, 5 Wallace, 35].
(*x*) *The Neutralitet*, 3 C. Rob. 297; *The Stert*, 4 Ibid. 65.

§ 523. Duration of the offence.

The offence incurred by a breach of blockade generally remains during the voyage; but the offence never travels on with the vessel further than to the end of the return voyage, although if she is taken in any part of that voyage, she is taken *in delicto*. This is deemed reasonable, because no other opportunity is afforded to the belligerent cruisers to vindicate the violated law. But where the blockade has been raised between the time of sailing and the capture, the penalty does not attach; because the blockade being gone, the necessity of applying the penalty to prevent future transgression no longer exists. When the blockade is raised, a veil is thrown over everything that has been done, and the vessel is no longer taken *in delicto*. The *delictum* may have been completed at one period, but it is by subsequent events done away (*y*).

§ 524. Right of visitation and search.

The right of visitation and search of neutral vessels at sea is a belligerent right, essential to the exercise of the right of capturing enemy's property, contraband of war, and vessels committing a breach of blockade. Even if the right of capturing enemy's property be ever so strictly limited, and the rule of *free ships free goods* be adopted, the right of visitation and search is essential, in order to determine whether the ships themselves are neutral, and documented as such, according to the law of nations and treaties; for, as Bynkershoek observes, "It is lawful to detain a neutral vessel, in order to ascertain, not by the flag merely, which may be fraudulently assumed, but by the documents themselves on board, whether she is really neutral." Indeed, it seems that the practice of maritime captures could not exist without it. Accordingly the text writers generally concur in recognising the existence of this right (*z*).

§ 525. Right of search and convoy.

The international law on this subject is ably summed up by Sir W. Scott, in the case of *The Maria*, where the exercise

(*y*) *The Welvaart Van Pillaw*, 2 C. Rob. 128; *The Lisette*, 6 C. Rob. 387. As to how far the act of the master binds the shipowner in cases of breach of blockade, see the cases collected in Wheaton's Reports, vol. ii. Appendix, pp. 36—40. [*The Wren*, 6 Wallace, 582.]

(*z*) Bynkershoek, Quæst. Jur. Pub. lib. i. cap. 14. Vattel, Droit des Gens, liv. iii. ch. 7, § 114. Martens, Précis, &c., liv. viii. ch. 7, §§ 317, 321. Galliani, dei Doveri de Principi Neutrali, &c., p. 458. Lampredi, Del Commercio de Popoli Neutrali, &c., p. 185. Kluber, Droit des Gens Moderne de l'Europe, § 293.

of the right was attempted to be resisted by the interposition of a convoy of Swedish ships of war. In delivering the judgment of the High Court of Admiralty in that memorable case, this learned civilian lays down the three following principles of law:—

§ 526. *The Maria.*

1. That the right of visiting and searching merchant ships on the high seas, whatever be the ships, the cargoes, the destinations, is an incontestable right of the lawfully commissioned cruisers of a belligerent nation. "I say, be the ships, the cargoes, and the destinations what they may, because, till they are visited and searched, it does not appear what the ships or the destination are; and it is for the purpose of ascertaining these points that the necessity of this right of visitation and search exists. This right is so clear in principle, that no man can deny it who admits the right of maritime capture; because if you are not at liberty to ascertain by sufficient inquiry whether there is property that can legally be captured, it is impossible to capture. Even those who contend for the inadmissible rule that *free ships make free goods*, must admit the exercise of this right at least for the purpose of ascertaining whether the ships are free ships or not. The right is equally clear in practice; for practice is uniform and universal upon the subject. The many European treaties which refer to this right, refer to it as pre-existing, and merely regulate the exercise of it. All writers upon the law of nations unanimously acknowledge it, without the exception even of Hubner himself, the great champion of neutral privileges."

2. That the authority of the neutral sovereign being forcibly interposed cannot legally vary the rights of a lawfully commissioned belligerent cruiser. "Two sovereigns may unquestionably agree, if they think fit, as in some late instances they have agreed, by special covenant, that the presence of one of their armed ships along with their merchant ships shall be mutually understood to imply that nothing is to be found in that convoy of merchant ships inconsistent with amity or neutrality; and if they consent to accept this pledge, no third party has a right to quarrel with it, any more than any other pledge which they may agree mutually to accept. But surely no sovereign can legally compel the acceptance of such a

security by mere force. The only security known to the law of nations upon this subject, independently of all special covenant, is the right of personal visitation and search, to be exercised by those who have the interest in making it."

3. That the penalty for the violent contravention of this right is the confiscation of the property so withheld from visitation and search. "For the proof of this I need only refer to Vattel, one of the most correct, and certainly not the least indulgent, of modern professors of public law. In book iii. c. 7, sect. 114, he expresses himself thus:—'On ne peut empêcher le transport des effets de contrebande, si l'on ne visite pas les vaisseaux neutres. On est donc en droit de les visiter. Quelques nations puissantes ont refusé en différents temps de se soumettre à cette visite. Aujourd'hui un vaisseau neutre, qui refuseroit de souffrir la visite, se feroit condamner par cela seul, comme étant de bonne prise.' Vattel is here to be considered, not as a lawyer merely delivering an opinion, but as a witness asserting a fact—the fact that such is the existing practice of modern Europe. Conformably to this principle, we find in the celebrated French ordinance of 1681, now in force, article 12, 'That every vessel shall be good prize in case of resistance and combat;' and Valin, in his smaller Commentary, p. 81, says expressly, that, although the expression is in the conjunctive, yet that the *resistance alone is sufficient.* He refers to the Spanish Ordinance, 1718, evidently copied from it, in which it is expressed in the disjunctive, 'in case of resistance *or* combat.' And recent instances are at hand and within view, in which it appears that Spain continues to act upon this principle. The first time it occurs to my notice on the inquiries I have been able to make in the institutes of our own country respecting matters of this nature, except what occurs in the Black Book of the Admiralty, is in the Order of Council, 1664, art. 12, which directs, 'That when any ship, met withal by the royal navy or other ship commissionated, shall fight or make resistance, the ship and goods shall be adjudged lawful prize.' A similar article occurs in the proclamation of 1672. I am, therefore, warranted in saying, that it was the rule, and the undisputed rule, of the British Admiralty. I will not say that the rule may not have been broken in upon, in some

instances, by considerations of comity or of policy, by which it may be fit that the administration of this species of law should be tempered in the hands of those tribunals which have a right to entertain and apply them; for no man can deny that a State may recede from its extreme rights, and that its supreme councils are authorized to determine in what cases it may be fit to do so, the particular captor having, in no case, any other right and title than what the State itself would possess under the same facts of capture. But I stand with confidence upon all principles of reason—upon the distinct authority of Vattel,—upon the institutes of other great maritime countries, as well as those of our own country, when I venture to lay it down that, by the law of nations, as now understood, a deliberate and continued resistance to search, on the part of a neutral vessel, to a lawful cruiser, is followed by the legal consequence of confiscation" (*a*).

§ 527. The armed neutrality of 1800.

The judgment of condemnation pronounced in this case was followed by the treaty of armed neutrality, entered into by the Baltic powers, in 1800, which league was dissolved by the death of the Emperor Paul; and the points in controversy between these powers and Great Britain were finally adjusted by the convention of 5th June, 1801. By the 4th article of this convention, the right of search as to merchant vessels sailing under neutral convoy was modified, by limiting it to public ships of war of the belligerent party, excluding private armed vessels. Subject to this modification, the pretension of resisting by means of convoy the exercise of the belligerent right of search, was surrendered by Russia and the other Northern powers, and various regulations were provided to prevent the abuse of that right to the injury of neutral commerce. As has already been observed, the object of this treaty is expressly declared by the contracting parties, in its preamble, to be the settlement of the differences which had grown out of the armed neutrality by "an invariable determination of their principles upon the rights of neutrality in their application to their respective monarchies." The 8th article also provides that "the principles and measures adopted by the present Act, shall be alike applicable to all the maritime wars

(*a*) *The Maria*, 1 C. Rob. 340.

in which one of the two powers may be engaged, whilst the other remains neutral. These stipulations shall consequently be regarded as permanent, and shall serve as a constant rule for the contracting parties in matters of commerce and navigation" (*b*).

§ 528. Forcible resistance by an enemy master.

In the case of *The Maria*, the resistance of the convoying ship was held to be a resistance of the whole fleet of merchant vessels under convoy, and subjected the whole to confiscation. This was a case of neutral property condemned for an attempted resistance by a neutral armed vessel to the exercise of the right of visitation and search, by a lawfully commissioned belligerent cruiser. But the forcible resistance by an enemy master will not, in general, affect neutral property laden on board an enemy's merchant vessel; for an attempt on his part to rescue his vessel from the possession of the captor, is nothing more than the hostile act of a hostile person, who has a perfect right to make such an attempt. "If a *neutral* master," says Sir W. Scott, "attempts a rescue, or to withdraw himself from search, he violates a duty which is imposed upon him by the law of nations, to submit to search, and to come in for inquiry as to the property of the ship or cargo; and if he violates this obligation by a recurrence to force, the consequence will undoubtedly reach the property of his owner; and it would, I think, extend also to the whole property intrusted to his care, and thus fraudulently attempted to be withdrawn from the operation of the rights of war. With an *enemy* master the case is very different; no duty is violated by such an act on his part—*lupum auribus teneo*, and if he can withdraw himself he has a right so to do" (*c*).

§ 529. Right of a neutral to carry his goods in an *armed* enemy vessel.

The question how far a neutral merchant has a right to lade his goods on board an armed enemy vessel, and how far his property is involved in the consequences of resistance by the enemy master, was agitated both in the British and American

(*b*) The question arising out of the case of the Swedish convoy gave rise to several instructive polemic essays. The judgment of Sir W. Scott was attacked by Professor J. F. W. Schlegel, of Copenhagen, in a Treatise on the Visitation of Neutral Ships under Convoy, transl. London, 1801; and vindicated by Dr. Croke in "Remarks on M. Schlegel's Work," 1801. See, also, "Letters of Sulpicius on the Northern Confederacy," London, 1801. "Substance of the Speech of Lord Grenville in the House of Lords, November 13, 1801," London, 1802. Wheaton's Hist. Law of Nations, pp. 390—420.

(*c*) *The Catharina Elizabeth*, 5 C. Rob. 232.

prize courts, during the last war between Great Britain and the United States. In a case adjudged by the Supreme Court of the United States, in 1815, it was determined, that a neutral had a right to charter and lade his goods on board a belligerent armed merchant ship, without forfeiting his neutral character, unless he actually concurred and participated in the enemy master's resistance to capture (*d*). Contemporaneously with this decision of the American court, Sir W. Scott held directly the contrary doctrine, and decreed salvage for the recapture of neutral Portuguese property, previously taken by an American cruiser from on board an armed British vessel, upon the ground that the American prize courts might justly have condemned the property (*e*). In reviewing its former decision, in a subsequent case adjudged in 1818, the American court confirmed it; and, alluding to the decisions in the English High Court of Admiralty, stated, that if a similar case should again occur in that court, and the decisions of the American court should in the meantime have reached the learned judge, he would be called upon to acknowledge that the danger of condemnation in the United States courts was not as great as he had imagined. In determining the last-mentioned case, the American court distinguished it both from those where neutral vessels were condemned for the unneutral act of the convoying vessel, and those where neutral vessels had been condemned for placing themselves under enemy's convoy. With regard to the first class of cases, it was well known that they originated in the capture of the Swedish convoy, at the time when Great Britain had resolved to throw down the glove to all the world, on the contested principles of the northern maritime confederacy. But, independently of this, there were several considerations which presented an obvious distinction between both classes of cases and that under consideration. A convoy was an association for a hostile object. In undertaking it, a State spreads over the merchant vessels an immunity from search which belongs only to a national ship; and by joining a convoy, every individual vessel puts off her pacific character, and

(*d*) *The Nereide*, 9 Cranch, 388.
(*e*) *The Fanny*, 1 Dods. Ad. 443.

undertakes for the discharge of duties which belong only to the military marine. If, then, the association be voluntary, the neutral, in suffering the fate of the entire convoy, has only to regret his own folly in wedding his fortune to theirs; or if involved in the resistance of the convoying ship, he shares the fate to which the leader of his own choice is liable in case of capture (*f*).

§ 530. Neutral vessels under enemy's convoy liable to capture?

The Danish government issued, in 1810, an ordinance relating to captures, which declared to be good and lawful prize "such vessels as, notwithstanding their flag is considered neutral, as well with regard to Great Britain as the powers at war with the same nation, still, either in the Atlantic or Baltic, have made use of English convoy." Under this ordinance, many American neutral vessels were captured, and, with their cargoes, condemned in the Danish prize courts for offending against its provisions. In the course of the discussions which subsequently took place between the American and Danish governments respecting the legality of these condemnations, the principles upon which the ordinance was grounded were questioned by the United States government, as inconsistent with the established rules of international law. It was insisted that the prize ordinances of Denmark, or of any other particular State, could not make or alter the general law of nations, nor introduce a new rule binding on neutral powers. The right of the Danish monarch to legislate for his own subjects and his own tribunals, was incontestible; but before his edicts could operate upon foreigners carrying on their commerce upon the seas, which are the common property of all nations, it must be shown that they were conformable to the law by which all are bound. It was, however, unnecessary to suppose, that in issuing these instructions to its cruisers, the Danish government intended to do anything more than merely to lay down rules of decision for its own tribunals, conformable to what that government understood to be just principles of public law. But the observation became important when it was considered, that the law of nations nowhere existed in a written code accessible to all, and to whose authority all deferred; and that the present question regarded the application of a principle (to say the

(*f*) *The Atalanta*, 3 Wheaton, 409.

least) of doubtful authority, to the confiscation of neutral property for a supposed offence committed, not by the owner, but by his agent the master, without the knowledge or orders of the owner, under a belligerent edict, retrospective in its operation, because unknown to those whom it was to affect.

§ 531. Captures under Danish ordinance of 1810.

The principle laid down in the ordinance, as interpreted by the Danish tribunals, was, that the fact of having navigated under enemy's convoy is, *per se*, a justifiable cause, not of capture merely, but of condemnation in the courts of the other belligerent; and *that*, without inquiring into the proofs of proprietary interest, or the circumstances and motives under which the captured vessel had joined the convoy, or into the legality of the voyage, or the innocence of her conduct in other respects. A belligerent pretension so harsh, apparently so new, and so important in its consequences, before it could be assented to by the neutral States, must be rigorously demonstrated by the authority of the writers on public law, or shown to be countenanced by the usage of nations. Not one of the numerous expounders of that law even mentioned it; no belligerent nation had ever before acted upon it; and still less could it be asserted that any neutral nation had ever acquiesced in it. Great Britain, indeed, had contended that a neutral State had no right to resist the exercise of the belligerent claim of visitation and search by means of convoys, *consisting of its own ships of war*. But the records even of the *British* Courts of Admiralty might be searched in vain for a precedent to support the principle maintained by Denmark, that the mere fact of having sailed under a belligerent convoy is, in all cases and under all circumstances, conclusive cause of condemnation.

§ 532. Argument of the American Commissioners.

The American vessels in question were engaged in their accustomed lawful trade, between Russia and the United States; they were unarmed, and made no resistance to the Danish cruisers; they were captured on the return voyage, after having passed up the Baltic and been subjected to examination by the Danish cruisers and authorities; and were condemned under an edict which was unknown, and consequently, as to them, did not exist when they sailed from Cronstadt, and which, unless it could be strictly shown to be consistent with the pre-existing law of nations, must be con-

sidered as an unauthorized measure of retrospective legislation. To visit upon neutral merchants and mariners extremely penal consequences from an act, which they had reason to believe to be innocent at the time, and which is not pretended to be forbidden by a single treaty or writer upon public law, by the general usage of nations, or even by the practice of any one belligerent, or the acquiescence of any one neutral State, must require something more than a mere resort to the supposed analogy of other acknowledged principles of international law, but from which it would be vain to attempt to deduce that now in question as a corollary.

Being found in company with an enemy's convoy might, indeed, furnish a *presumption* that the captured vessel and cargo belonged to the enemy, in the same manner as goods taken in an enemy's vessel are presumed to be enemy's property until the contrary is proved; but this presumption is not of that class of presumptions called *presumptiones juris et de jure*, which are held to be conclusive upon the party, and which he is not at liberty to controvert. It is a slight presumption only, which will readily yield to countervailing proof. One of the proofs which, in the opinion of the American negotiator, ought to have been admitted by the prize tribunal to countervail this presumption, would have been evidence that the vessel had been compelled to join the convoy; or that she had joined it, not to protect herself from examination by Danish cruisers, but against others, whose notorious conduct and avowed principles rendered it certain that captures by them would inevitably be followed by condemnation. It followed, then, that the simple fact of having navigated under British convoy could be considered as a ground of suspicion only, warranting the captors in sending in the captured vessel for further examination, but not constituting in itself a conclusive ground of confiscation.

Indeed it was not perceived how it could be so considered, upon the mere ground of its interfering with the exercise of the belligerent pretension of visitation and search, by a State, which, when neutral, had asserted the right of protecting its private commerce against belligerent visitation and search by armed convoys of its own public ships.

Nor could the consistency of the Danish government, in § 533.

this respect, be vindicated, by assuming a distinction between the doctrine maintained by Denmark, when neutral, against Great Britain, from that which she sought, as a belligerent, to enforce against America. Why was it that navigating under the convoy of a *neutral* ship of war was deemed a conclusive cause of condemnation? It was because it tended to impede and defeat the belligerent right of search—to render every attempt to exercise this lawful right a contest of violence—to disturb the peace of the world, and to withdraw from the proper forum the determination of such controversies by forcibly preventing the exercise of its jurisdiction.

The mere circumstance of sailing in company with a *belligerent* convoy had no such effect; being an *enemy*, the belligerent had *a right to resist*. The masters of the vessels under his convoy could not be involved in the consequences of that resistance, because they were neutral, and had not actually participated in the resistance. They could no more be involved in the consequences of a resistance by the belligerent, which is his own lawful act, than is the neutral shipper of goods on board a belligerent vessel for the resistance of the master of that vessel, or the owner of neutral goods found in a belligerent fortress for the consequences of its resistance.

The right of capture in war extends only to things actually belonging to the enemy, or such as are considered as constructively belonging to him, because taken in a trade prohibited by the laws of war, such as contraband or property taken in breach of blockade, and other analogous cases; but the property now in question was neither constructively nor actually the property of the enemy of Denmark. It was not pretended that it was actually his property, and it could not be shown to have been constructively his. If, indeed, these American vessels had been armed; if they had thus contributed to augment the force of the belligerent convoy; or if they had actually participated in battle with the Danish cruisers,—they would justly have fallen by the fate of war, and the voice of the American government would never have been raised in their favour. But they were, in fact, unarmed merchantmen; and far from increasing the force of the British convoying squadron, their junction tended to weaken it by expanding the sphere of its protecting duty; and instead of participating in the enemy's

resistance, in fact there was no battle and no resistance, and the merchant vessels fell a defenceless prey to the assailants.

The illegality of the act on the part of the neutral masters, for which the property of their owners had been confiscated, must then be sought for in a higher source, and must be referred back to the circumstance of *their joining the convoy.* But why should this circumstance be considered illegal, any more than the fact of a neutral taking shelter in a belligerent port, or under the guns of a belligerent fortress which is subsequently invested and taken? The neutral cannot, indeed, seek to escape from visitation and search by *unlawful* means, either of force or fraud; but if, by the use of any lawful and innocent means, he may escape, what is to hinder his resorting to such means for the purpose of avoiding a proceeding so vexatious? The belligerent cruisers and prize courts had not always been so moderate and just as to render it desirable for the neutral voluntarily to seek for an opportunity of being examined and judged by them. Upon the supposition, indeed, that justice was administered promptly, impartially, and purely in the prize tribunals of Denmark, the American shipmasters could have had no motive to avoid an examination by Danish cruisers, since their proofs of property were clear, their voyages lawful, and they were not conscious of being exposed to the slightest hazard of condemnation in these tribunals. Indeed, some of these vessels had been examined on their voyage up the Baltic, and acquitted by the Danish Courts of Admiralty. Why, then, should a guilty motive be imputed to them, when their conduct could be more naturally explained by an innocent one? Surely, in the multiplied ravages to which neutral commerce was then exposed on every sea, from the sweeping decrees of confiscation fulminated by the great belligerent powers, the conduct of these parties might be sufficiently accounted for, without resorting to the supposition that they meant to resist or even to evade the exercise of the belligerent rights of Denmark. § 534.

Even admitting, then, that the neutral American had no right to put himself under convoy or in order to avoid the exercise of the right of visitation and search by a *friend*, as Denmark professed to be, he had still a perfect right to defend himself against his *enemy*, as France had shown herself to be,

by her conduct, and the avowed principles upon which she had declared open war against all neutral trade. Denmark had a right to capture the commerce of her enemy, and for that purpose to search and examine vessels under the neutral flag, whilst America had an equal right to protect her commerce against French capture by all the means allowed by the ordinary laws of war between enemies. The exercise of this perfect right could not legally be affected by the circumstance of the war existing between Denmark and England, or by the alliance between Denmark and France. America and England were at peace. The alliance between Denmark and France was against England, not against America; and the Danish government, which had refused to adopt the decrees of Berlin and Milan as the rule of its conduct towards neutrals, could not surely consider it culpable on the part of the American shipmasters to have defended themselves against the operation of these decrees by every means in their power. If the use of any of these means conflicted in any degree with the belligerent rights of Denmark, that was an incidental consequence, which could not be avoided by the parties without sacrificing their incontestible right of self-defence.

§ 535. But it might perhaps be said, that as resistance to the right of search is, by the law and usage of nations, a substantive ground of condemnation *in the case of the master of a single ship*, still more must it be so, where *many vessels are associated* for the purpose of defeating the exercise of the same right.

In order to render the two cases stated perfectly analogous, there must have been an actual resistance on the part of the vessels in question, or, at least, on the part of the enemy's fleet, having them at the time under its protection, so as to connect them inseparably with the acts of the enemy. Here was no *actual* resistance on the part of either, but only a *constructive* resistance on the part of the neutral vessels, implied from the fact of their having joined the enemy's convoy. This, however, was, at most, a *mere intention to resist*, never carried into effect, which had never been considered in the case of a single ship, as involving the penalty of confiscation. But the resistance of the master of a single ship, which is supposed to be analogous to the case of convoy, must refer to a *neutral*

master, whose resistance would, by the established law of nations, involve both ship and cargo in the penalty of confiscation. The same principle would not, however, apply to the case of an *enemy*-master, who has an incontestible right to resist his enemy, and whose resistance could not affect the *neutral owner of the cargo*, unless he was on board, and actually participated in the resistance. Such was, in a similar case, the judgment of Sir W. Scott. So also the right of a neutral to transport his goods on board even of an *armed* belligerent vessel, was solemnly affirmed by the decision of the highest judicial tribunal in the United States, during the late war with Great Britain, after a most elaborate discussion, in which all the principles and analogies of public law bearing upon the question were thoroughly examined and considered.

The American negotiator then confidently relied upon the position assumed by him—that the entire silence of all the authoritative writers on public law, as to any such exception to the general freedom of neutral navigation, laid down by them in such broad and comprehensive terms, and of every treaty made for the special purpose of defining and regulating the rights of neutral commerce and navigation, constituted of itself a strong negative authority to show, that no such exception exists, especially as that freedom is expressly extended to every case which has the slightest resemblance to that in question. It could not be denied that the goods of a friend, found in an enemy's fortress, are exempt from confiscation as prize of war; that a neutral may lawfully carry his goods in an armed belligerent ship; that the neutral shipper of goods on board an enemy's vessel, (armed or unarmed,) is not responsible for the consequences of resistance by the enemy-master. How then could the neutral owner, both of ship and cargo, be responsible for the acts of the belligerent convoy, under the protection of which his property had been placed, not by his own immediate act, but by that of the master proceeding without the knowledge or instructions of the owner?

Such would certainly be the view of the question, even applying to it the largest measure of belligerent rights ever assumed by any maritime State. But when examined by the milder interpretations of public law, which the Danish government, in common with the other northern powers of Europe

had hitherto patronized, it would be found still more clear of doubt. If, as Denmark had always insisted, a neutral might lawfully arm himself against all the belligerents; if he might place himself under the convoying force of his own country, so as to defy the exercise of belligerent force to compel him to submit to visitation and search on the high seas; the conduct of the neutral Americans who were driven to take shelter under the floating fortresses of the enemy of Denmark, not for the purpose of resisting the exercise of her belligerent rights, but to protect themselves against the lawless violence of those, whose avowed purpose rendered it certain, that, notwithstanding this neutrality, capture would inevitably be followed by condemnation, would find its complete vindication in the principles which the public jurists and statesmen of that country had maintained in the face of the world. Had the American commerce in the Baltic been placed under the protection of the public ships of war of the United States, as it was admitted it might have been, the belligerent rights of Denmark would have been just as much infringed as they were by what actually happened. In that case, the Danish cruisers must, upon Danish principles, have been satisfied with the assurance of the commander of the American convoying squadron, as to the neutrality of the ships and cargoes sailing under his protection. But that assurance could only have been founded upon their being accompanied with the ordinary documents found on board of American vessels, and issued by the American government upon the representations and proofs furnished by the interested parties. If these might be false and fraudulent in the one case, so might they be in the other, and the Danish government would be equally deprived of all means of examining their authenticity in both. In the one, it would be deprived of those means by its own voluntary acquiescence in the statement of the commander of the convoying squadron, and in the other, by the presence of a superior enemy's force, preventing the Danish cruisers from exercising their right of search. This was put for the sake of illustration, upon the supposition that the vessels under convoy had escaped from capture; for upon that supposition only could any *actual* injury have been sustained by Denmark as a belligerent power. Here they were captured without any hostile conflict,

and the question was, whether they were liable to confiscation for having navigated under the enemy's convoy, notwithstanding the neutrality of the property and the lawfulness of their voyage in other respects.

Even supposing, then, that it was the intention of the American shipmasters, in sailing with the British convoy, to escape from Danish as well as French cruisers, that intention had failed of its effect; and it might be asked, what belligerent right of Denmark had been practically injured by such an abortive attempt? If any, it must be the right of visitation and search. But that right is not a substantive and independent right, with which belligerents are invested by the law of nations for the purpose of wantonly vexing and interrupting the commerce of neutrals. It is a right growing out of a greater right of capturing enemy's property, or contraband of war, and to be used, as means to an end, to enforce the exercise of that right. Here the actual exercise of the right was never in fact opposed, and no injury had accrued to the belligerent power. But it would, perhaps, be said, that it might have been opposed and actually defeated, had it not been for the accidental circumstance of the separation of these vessels from the convoying force, and that the entire commerce of the world with the Baltic Sea might thus have been effectually protected from Danish capture. And it might be asked in reply, what injury would have resulted to the belligerent rights of Denmark from that circumstance? If the property were neutral, and the voyage lawful, what injury would result from the vessels escaping from examination? On the other hand, if the property were enemy's property, its escape must be attributed to the superior force of the enemy, which, though a *loss*, could not be an *injury* of which Denmark would have a lawful right to complain. Unless it could be shown that a neutral vessel navigating the seas is bound *to volunteer to be searched* by the belligerent cruisers, and that she had no right to avoid search by any means whatever, it was apparent that she might avoid it by any means not unlawful. Violent resistance to search, rescue after seizure, fraudulent spoliation or concealment of papers, are all avowedly unlawful means, which, unless extenuated by circumstances, may justly be visited with the penalty of confiscation. Those who alleged that sailing under

§ 536.

belligerent convoy was also attended with the same consequences, must show it, by appealing to the oracles of public law, to the text of treaties, to some decision of an international tribunal, or to the general practice and understanding of nations (*g*).

§ 537. Treaty between the United States and Denmark.

The negotiation finally resulted in the signature of a treaty, in 1830, between the United States and Denmark, by which the latter power stipulated to indemnify the American claimants generally for the seizure of their property by the payment of a fixed sum *en bloc*, leaving it to the American government to apportion it by commissioners appointed by itself, and authorized to determine "according to the principles of justice, equity, and the law of nations," with a declaration that the convention, having no other object than to terminate all the claims, "can never hereafter be invoked, by one party or the other, as a precedent or rule for the future" (*h*).

(*g*) Mr. Wheaton to Count Schimmelmann, 1828.
(*h*) Martens, Nouveau Recueil, tom. viii. p. 350. Elliot's American Diplomatic Code, vol. i. p. 453.

CHAPTER IV.

TREATY OF PEACE.

§ 538. Power of making peace dependent on the municipal constitution.

THE power of concluding peace, like that of declaring war, depends upon the municipal constitution of the State. These authorities are generally associated. In unlimited monarchies, both reside in the sovereign; and even in limited or constitutional monarchies, each may be vested in the crown. Such is the British Constitution, at least in form; but it is well known, that in its practical administration, the real power of making war actually resides in the Parliament, without whose approbation it cannot be carried on, and which body has consequently the power of compelling the Crown to make peace, by withholding the supplies necessary to prosecute hostilities. The American Constitution vests the power of declaring war in the two houses of Congress, with the assent of the President. By the forms of the Constitution, the President has the exclusive power of making treaties of peace, which, when ratified with the advice and consent of the Senate, become the supreme law of the land, and have the effect of repealing the declaration of war and all other laws of Congress, and of the several States which stand in the way of their stipulations. But the Congress may at any time compel the President to make peace, by refusing the means of carrying on war. In France, the King has, by the express terms of the constitutional charter, power to declare war, to make treaties of peace, of alliance, and of commerce; but the real power of making both peace and war resides in the Chambers, which have the authority of granting or refusing the means of prosecuting hostilities.

§ 539. Power of making treaties of peace

The power of making treaties of peace, like that of making other treaties with foreign States is, or may be, limited in its extent by the national constitution. We have already seen

limited in its extent.

that a general authority to make treaties of peace necessarily implies a power to stipulate the conditions of peace; and among these may properly be involved the cession of the public territory and other property, as well as of private property included in the eminent domain. If, then, there be no limitation, expressed in the fundamental laws of the State, or necessarily implied from the distribution of its constitutional authorities, on the treaty-making power in this respect, it necessarily extends to the alienation of public and private property, when deemed necessary for the national safety or policy (*a*).

§ 540. Indemnity to individuals for losses by public concessions.

The duty of making compensation to individuals, whose private property is thus sacrificed to the general welfare, is inculcated by public jurists, as correlative to the sovereign right of alienating those things which are included in the eminent domain; but this duty must have its limits. No government can be supposed to be able, consistently with the welfare of the whole community, to assume the burden of losses produced by conquest, or the violent dismemberment of the State. Where, then, the cession of territory is the result of coercion and conquest, forming a case of imperious necessity beyond the power of the State to control, it does not impose any obligation upon the government to indemnify those who may suffer a loss of property by the cession (*b*).

§ 541. Dismemberment of States by treaty.

The fundamental laws of most free governments limit the treaty-making power, in respect to the dismemberment of the State, either by an express prohibition, or by necessary implication from the nature of the constitution. Thus, even under the constitution of the old French monarchy, the States-General of the kingdom declared that Francis I. had no power to dismember the kingdom, as was attempted by the Treaty of Madrid, concluded by that monarch; and that not merely upon the ground that he was a prisoner, but that the assent of the nation, represented in the States-General, was essential to the validity of the treaty. The cession of the province of Burgundy was therefore annulled, as contrary to the funda-

(*a*) *Vide ante*, Pt. iii. ch. 2, § 266.

(*b*) Grotius, de Jur. Bel. ac Pac. lib, iii. cap. 20, § 7. Vattel, Droit des Gens, liv. i. ch. 20, § 244; liv. iv. ch. 2, § 12. Kent's Comment. on American Law, vol. i. p. 178, 5th ed.

mental laws of the kingdom; and the provincial States of that duchy, according to Mezeray, declared, that "never having been other than subjects of the crown of France, they would die in that allegiance; and if abandoned by the king, they would take up arms, and maintain by force their independence, rather than pass under a foreign dominion." But when the ancient feudal constitution of France was gradually abolished by the disuse of the States-General, and the absolute monarchy became firmly established under Richelieu and Louis XIV., the authority of ceding portions of the public territory, as the price of peace, passed into the hands of the king, in whom all the other powers of government were concentrated. The different constitutions established in France, subsequently to the Revolution of 1789, limited this authority in the hands of the Executive in various degrees. The provision in the Constitution of 1795, by which the recently conquered countries on the left bank of the Rhine were annexed to the French territory, became an insuperable obstacle to the conclusion of peace in the conferences at Lisle. By the Constitutional Charter of 1830, the king is invested with the power of making peace, without any limitation of this authority, other than that which is implied in the general distribution of the constitutional powers of the government. Still it is believed that, according to the general understanding of French public jurists, the assent of the Chambers, clothed with the forms of a legislative act, is considered essential to the ultimate validity of a treaty ceding any portion of the national territory. The extent and limits of the territory being defined by the municipal laws, the treaty-making power is not considered sufficient to repeal those laws.

§ 542. Treaty-making power of Great Britain.

In Great Britain, the treaty-making power, as a branch of the regal prerogative, has in theory no limits; but it is practically limited by the general controlling authority of Parliament; whose approbation is necessary to carry into effect a treaty, by which the existing territorial arrangements of the empire are altered.

§ 543. Treaty-making power of a Confederation.

In confederated governments, the extent of the treaty-making power, in this respect, must depend upon the nature of the confederation. If the union consists of a system of confederated States, each retaining its own sovereignty com-

plete and unimpaired, it is evident that the federal head, even if invested with the general power of making treaties of peace for the confederacy, cannot lawfully alienate the whole or any portion of the territory of any member of the union, without the express assent of that member. Such was the theory of the ancient Germanic Constitution; the dismemberment of its territory was contrary to the fundamental laws and maxims of the empire; and such is believed to be the actual constitution of the present Germanic Confederation. This theory of the public law of Germany has often been compelled to yield in practice to imperious necessity; such as that which forced the cession to France of the territories belonging to the States of the empire, on the left bank of the Rhine, by the treaty of Luneville, in 1800. Even in the case of a supreme federal government, or composite State, like that of the United States of America, it may, perhaps, be doubted how far the mere general treaty-making power, vested in the federal head, necessarily carries with it that of alienating the territory of any member of the union without its consent.

§ 544. Effects of a treaty of peace.

The effect of a treaty of peace is to put an end to the war, and to abolish the subject of it. It is an agreement to waive all discussion concerning the respective rights and claims of the parties, and to bury in oblivion the original causes of the war. It forbids the revival of the same war, by resuming hostilities for the original cause which first kindled it, or for whatever may have occurred in the course of it. But the reciprocal stipulation of perpetual peace and amity between the parties does not imply that they are never again to make war against each other for any cause whatever. The peace relates to the war which it terminates; and is perpetual, in the sense that the war cannot be revived for the same cause. This will not, however, preclude the right to claim and resist, if the grievances which originally kindled the war be repeated —for that would furnish a new injury and a new cause of war, equally just with the former. If an abstract right be in question between the parties, on which the treaty of peace is silent, it follows, that all previous complaints and injury, arising under such claim, are thrown into oblivion, by the *amnesty*, necessarily implied, if not expressed; but the claim itself is not thereby settled either one way or the other. In

the absence of express renunciation or recognition, it remains open for future discussion. And even a specific arrangement of a matter in dispute, if it be special and limited, has reference only to that particular mode of asserting the claim, and does not preclude the party from any subsequent pretensions to the same thing on other grounds. Hence the utility in practice of requiring a general renunciation of all pretensions to the thing in controversy, which has the effect of precluding for ever the assertion of the claim in any mode (*c*).

The treaty of peace does not extinguish claims founded upon debts contracted or injuries inflicted previously to the war, and unconnected with its causes, unless there be an express stipulation to that effect. Nor does it affect private rights acquired antecedently to the war, or private injuries unconnected with the causes which produced the war. Hence debts previously contracted between the respective subjects, though the remedy for their recovery is suspended during the war, are revived on the restoration of peace, unless actually confiscated, in the meantime, in the rigorous exercise of the strict rights of war, contrary to the milder practice of recent times. There are even cases where debts contracted, or injuries committed, between the respective subjects of the belligerent nations during the war, may become the ground of a valid claim, as in the case of ransom-bills, and of contracts made by prisoners of war for subsistence, or in the course of trade carried on under a license. In all these cases, the remedy may be asserted subsequently to the peace (*d*).

§ 545. *Uti possidetis* the basis of every treaty of peace, unless the contrary be expressed.

The treaty of peace leaves every thing in the state in which it found it, unless there be some express stipulation to the contrary. The existing state of possession is maintained, except so far as altered by the terms of the treaty. If nothing be said about the conquered country or places, they remain with the conqueror, and his title cannot afterwards be called in question. During the continuance of the war, the conqueror in possession has only a usufructuary right, and the latent title of the former sovereign continues, until the treaty of peace, by its silent operation, or express provisions, extinguishes his title for ever (*e*).

(*c*) Vattel, Droit des Gens, liv. iv. ch. 2, §§ 19—21.
(*d*) Kent's Comment, vol. i. p. 168, 5th ed.
(*e*) Grotius, de Jur. Bel. ac Pac. lib. iii. cap. 6, §§ 4, 5. Vattel, Droit des

§ 546. Effect of restoration of territory by a treaty of peace.

The restoration of the conquered territory to its original sovereign, by the treaty of peace, carries with it the restoration of all persons and things which have been temporarily under the enemy's dominion, to their original state. This general rule is applied, without exception, to real property or immovables. The title acquired in war to this species of property, until confirmed by a treaty of peace, confers a mere temporary right of possession. The proprietary right cannot be transferred by the conqueror to a third party, so as to entitle him to claim against the former owner, on the restoration of the territory to the original sovereign. If, on the other hand, the conquered territory is ceded by the treaty of peace to the conqueror, such an intermediate transfer is thereby confirmed, and the title of the purchaser becomes valid and complete. In respect to personal property or movables, a different rule is applied. The title of the enemy to things of this description is considered complete against the original owner after twenty-four hours' possession, in respect to booty on land. The same rule was formerly considered applicable to captures at sea; but the more modern usage of maritime nations requires a formal sentence of condemnation as prize of war, in order to preclude the right of the original owner to restitution on payment of salvage. But since the *jus postliminii* does not, strictly speaking, operate after the peace; if the treaty of peace contains no express stipulation respecting captured property, it remains in the condition in which the treaty finds it, and is thus tacitly ceded to the actual possessor. The *jus postliminii* is a right which belongs exclusively to a state of war; and therefore a transfer to a neutral, before the peace, even without a judicial sentence of condemnation, is valid, if there has been no recovery or recapture before the peace. The intervention of peace covers all defects of title, and vests a lawful possession in the neutral, in the same manner as it quiets the title of the hostile captor himself (*f*).

§ 547. From what time the treaty of

A treaty of peace binds the contracting parties from the time of its signature. Hostilities are to cease between them from that time, unless some other period be provided in the

Gens, liv. iii. ch. 13, §§ 197, 198. Martens, Précis du Droit des Gens, liv. iii. ch. 4, § 282. Klüber, Droit des Gens Moderne de l'Europe, §§ 254—259.

(*f*) Vattel, liv. iii. ch. 14, §§ 209, 212, 216. *The Purissima Conception*, 6 C. Rob. 45; *The Sophia*, Ibid. 138.

treaty itself. But the treaty binds the subjects of the belligerent nations only from the time it is notified to them. Any intermediate acts of hostility committed by them before it was known, cannot be punished as criminal acts, though it is the duty of the State to make restitution of the property seized subsequently to the conclusion of the treaty; and, in order to avoid disputes respecting the consequences of such acts, it is usual to provide, in the treaty itself, the periods at which hostilities are to cease in different places. Grotius intimates an opinion that individuals are not responsible, even *civiliter*, for hostilities thus continued after the conclusion of peace, so long as they are ignorant of the fact, although it is the duty of the State to make restitution, wherever the property has not been actually lost or destroyed. But the better opinion seems to be, that wherever a capture takes place at sea, after the signature of the treaty of peace, mere ignorance of the fact will not protect the captor from civil responsibility in damages; and that, if he acted in good faith, his own government must protect him and save him harmless. When a place or country is exempted from hostility by articles of peace, it is the duty of the State to give its subjects timely notice of the fact. In such a case it is the actual wrong-doer who is made responsible to the injured party, and not the superior commanding officer of the fleet, unless he be on the spot, and actually participating in the transaction. Nor will damages be decreed by the Prize Court, even against the actual wrong-doer, after a lapse of a great length of time (*g*).

peace commences its operation.

§ 548. Cessation of hostilities after treaty.

When the treaty of peace contains an express stipulation that hostilities are to cease in a given place at a certain time, and a capture is made previous to the expiration of the period limited, but with a knowledge of the peace on the part of the captor, the capture is still invalid; for since constructive knowledge of the peace, after the periods limited in the different parts of the world, renders the capture void, much more ought actual knowledge of the peace to produce that effect. It may, however, be questionable whether anything short of an official notification from his own government would be sufficient, in such a case, to affect the captor with the legal

(*g*) *The Mentor*, 1 C. Rob. 121.

consequences of actual knowledge. And where a capture of a British vessel was made by an American cruiser, before the period fixed for the cessation of hostilities by the Treaty of Ghent, in 1814, and in ignorance of the fact,—but the prize had not been carried *infra præsidia* and condemned, and while at sea was recaptured by a British ship of war, after the period fixed for the cessation of hostilities, but without knowledge of the peace,—it was judicially determined, that the possession of the vessel by an American cruiser was a lawful possession, and that the British recaptor could not, after the peace, lawfully use force to divest this lawful possession. The restoration of peace put an end, from the time limited, to all force; and then the general principle applied, that things acquired in war remain, as to title and possession, precisely as they stood when the peace took place. The *uti possidetis* is the basis of every treaty of peace, unless the contrary be expressly stipulated. Peace gives a final and perfect title to captures without condemnation, and as it forbids all force, it destroys all hope of recovery, as much as if the captured vessel was carried *infra præsidia* and judicially condemned (*h*).

§ 549. In what condition things taken are to be restored.

Things stipulated to be restored by the treaty, are to be restored in the condition in which they were first taken, unless there be an express provision to the contrary; but this does not refer to alterations which have been the natural effect of time, or of the operations of war. A fortress or town is to be restored as it was when taken, so far as it still remains in that condition when the peace is concluded. There is no obligation to repair, as well as restore, a dismantled fortress or a ravaged territory. The peace extinguishes all claim for damages done in war, or arising from the operations of war. Things are to be restored in the condition in which the peace found them; and to dismantle a fortification or waste a country after the conclusion of peace, and previously to the surrender, would be an act of perfidy. If the conqueror has repaired the fortifications, and re-established the place in the state it was in before the siege, he is bound to restore it in the same condition. But if he has constructed new works, he may demolish them; and,

(*h*) Valin, Traité des Prises, ch. 4, §§ 4, 5. Emérigon, Traité d'Assurance, ch. 12, § 19. Merlin, Répertoire de Jurisprudence, tom. ix. tit. Prise Maritime, § 5. Kent's Comment. vol. i. p. 172, 5th ed.

in general, in order to avoid disputes, it is advisable to stipulate in the treaty precisely in what condition the places occupied by the enemy are to be restored (*i*).

§ 550. Breach of the treaty.

The violation of any one article of the treaty is a violation of the whole treaty; for all the articles are dependent on each other, and one is to be deemed a condition of the other. A violation of any single article abrogates the whole treaty, if the injured party so elects to consider it. This may, however, be prevented by an express stipulation, that if one article be broken, the others shall nevertheless continue in full force. If the treaty is violated by one of the contracting parties, either by proceedings incompatible with its general spirit, or by a specific breach of any one of its articles, it becomes, not absolutely void, but voidable at the election of the injured party. If he prefers not to come to a rupture, the treaty remains valid and obligatory. He may waive or remit the infraction committed, or he may demand a just satisfaction (*k*).

§ 551. Disputes respecting its breach, how adjusted.

Treaties of peace are to be interpreted by the same rules with other treaties. Disputes respecting their meaning or alleged infraction may be adjusted by amicable negotiation between the contracting parties, by the mediation of friendly powers, or by reference to the arbitration of some one power selected by the parties. This latter office has recently been assumed, in several instances, by the five great powers of Europe, with the view of preventing the disturbance of the general peace, by a partial infraction of the territorial arrangements stipulated by the treaties of Vienna, in consequence of the internal revolutions which have taken place in some of the States constituted by those treaties. Such are the protocols of the conference of London, by which a suspension of hostilities between Holland and Belgium was enforced, and terms of separation between the two countries proposed, which, when accepted by both, became the basis of a permanent peace. The objections to this species of interference, and the difficulty of reconciling it with the independence of the smaller powers, are obvious; but it is clearly distinguishable from that general right of superintendence over the internal affairs of other

(*i*) Vattel, Droit des Gens, liv. iv. ch. 3, § 81.
(*k*) Grotius, de Jur. Bel. ac Pac. lib. ii. cap. 15, § 15; lib. iii. cap. 19, § 14. Vattel, liv. iv. ch. 4, §§ 47, 48, 54.

States, asserted by the powers who were the original parties to the Holy Alliance, for the purpose of preventing changes in the municipal constitutions not proceeding from the voluntary concession of the reigning sovereign, or supposed in their consequences, immediate or remote, to threaten the social order of Europe. The proceedings of the conference treated the revolution, by which the union between Holland and Belgium, established by the Congress of Vienna, had been dissolved, as an irrevocable event; and confirmed the independence, neutrality, and state of territorial possession of Belgium, upon the conditions contained in the Treaty of the 15th November, 1831, between the five powers and that kingdom, subject to such modifications as might ultimately be the result of direct negotiations between Holland and Belgium (*l*).

(*l*) Wheaton's Hist. Law of Nations, pp. 538—555.

APPENDIX A.

ENGLISH AND AMERICAN NATURALIZATION ACTS.

I. English Acts.—33 & 34 Vict. c. 14.

An Act to amend the Law relating to the legal condition of Aliens and British Subjects. [12th May, 1870.]

Whereas it is expedient to amend the law relating to the legal condition of aliens and British subjects:

Be it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

1. This Act may be cited for all purposes as "The Naturalization Act, 1870." Short title.

Status of Aliens in the United Kingdom.

2. Real and personal property of every description may be taken, acquired, held, and disposed of by an alien in the same manner in all respects as by a natural-born British subject; and a title to real and personal property of every description may be derived through, from, or in succession to an alien, in the same manner in all respects as through, from, or in succession to a natural-born British subject: Provided,— Capacity of an alien as to property.

(1.) That this section shall not confer any right on an alien to hold real property situate out of the United Kingdom, and shall not qualify an alien for any office or for any municipal, parliamentary, or other franchise:

(2.) That this section shall not entitle an alien to any right or privilege as a British subject, except such rights and privileges in respect of property as are hereby expressly given to him:

(3.) That this section shall not affect any estate or interest in real or personal property to which any person has or may become entitled, either mediately or immediately, in possession or expectancy, in pursuance of any disposition made before the passing of this Act, or in pursuance of any devolution by law on the death of any person dying before the passing of this Act.

3. Where Her Majesty has entered into a convention with any foreign State to the effect that the subjects or citizens of that State who Power of naturalized

aliens to divest themselves of their status in certain cases.

have been naturalized as British subjects may divest themselves of their status as such subjects, it shall be lawful for Her Majesty, by Order in Council, to declare that such convention has been entered into by Her Majesty; and from and after the date of such Order in Council, any person being originally a subject or citizen of the State referred to in such Order, who has been naturalized as a British subject, may, within such limit of time as may be provided in the convention, make a declaration of alienage, and from and after the date of his so making such declaration such person shall be regarded as an alien, and as a subject of the State to which he originally belonged as aforesaid.

A declaration of alienage may be made as follows; that is to say,—If the declarant be in the United Kingdom in the presence of any justice of the peace, if elsewhere in Her Majesty's dominions in the presence of any judge of any court of civil or criminal jurisdiction, of any justice of the peace, or of any other officer for the time being authorized by law in the place in which the declarant is to administer an oath for any judicial or other legal purpose. If out of Her Majesty's dominions in the presence of any officer in the diplomatic or consular service of Her Majesty.

How British-born subject may cease to be such.

4. Any person who by reason of his having been born within the dominions of Her Majesty is a natural-born subject, but who also at the time of his birth became under the law of any foreign State a subject of such State, and is still such subject, may, if of full age and not under any disability, make a declaration of alienage in manner aforesaid, and from and after the making of such declaration of alienage such person shall cease to be a British subject. Any person who is born out of Her Majesty's dominions of a father being a British subject may, if of full age, and not under any disability, make a declaration of alienage in manner aforesaid, and from and after the making of such declaration shall cease to be a British subject.

Alien not entitled to jury de medietate linguæ.

5. From and after the passing of this Act, an alien shall not be entitled to be tried by a jury de medietate linguæ, but shall be triable in the same manner as if he were a natural-born subject.

Expatriation.

Capacity of British subject to renounce allegiance to Her Majesty.

6. Any British subject who has at any time before, or may at any time after the passing of this Act, when in any foreign State and not under any disability voluntarily become naturalized in such State, shall from and after the time of his so having become naturalized in such foreign State, be deemed to have ceased to be a British subject and be regarded as an alien: Provided,—

(1.) That where any British subject has before the passing of this Act voluntarily become naturalized in a foreign State and yet is desirous of remaining a British subject, he may, at any time within two years after the passing of this Act, make a declaration that he is desirous of remaining a British subject, and upon such declaration herein-after referred to as a declaration of British nationality being made, and upon his taking the oath of allegiance, the declarant shall be deemed to be and to have been continually a British

subject; with this qualification, that he shall not, when within the limits of the foreign State in which he has been naturalized, be deemed to be a British subject, unless he has ceased to be a subject of that State in pursuance of the laws thereof, or in pursuance of a treaty to that effect:

(2.) A declaration of British nationality may be made, and the oath of allegiance be taken as follows; that is to say,—if the declarant be in the United Kingdom in the presence of a justice of the peace; if elsewhere in her Majesty's dominions in the presence of any judge of any court of civil or criminal jurisdiction, of any justice of the peace, or of any other officer for the time being authorized by law in the place in which the declarant is to administer an oath for any judicial or other legal purpose. If out of Her Majesty's dominions in the presence of any officer in the diplomatic or consular service of Her Majesty.

Naturalization and resumption of British Nationality.

Certificate of naturalization.

7. An alien who, within such limited time before making the application herein-after mentioned as may be allowed by one of Her Majesty's Principal Secretaries of State, either by general order or on any special occasion, has resided in the United Kingdom for a term of not less than five years, or has been in the service of the Crown for a term of not less than five years, and intends when naturalized, either to reside in the United Kingdom, or to serve under the Crown, may apply to one of Her Majesty's Principal Secretaries of State for a certificate of naturalization.

The applicant shall adduce in support of his application such evidence of his residence or service, and intention to reside or serve, as such Secretary of State may require. The said Secretary of State, if satisfied with the evidence adduced, shall take the case of the applicant into consideration, and may, with or without assigning any reason, give or withhold a certificate as he thinks most conducive to the public good, and no appeal shall lie from his decision, but such certificate shall not take effect until the applicant has taken the oath of allegiance.

An alien to whom a certificate of naturalization is granted shall in the United Kingdom be entitled to all political and other rights, powers, and privileges, and be subject to all obligations, to which a natural-born British subject is entitled or subject in the United Kingdom, with this qualification, that he shall not, when within the limits of the foreign State of which he was a subject previously to obtaining his certificate of naturalization, be deemed to be a British subject unless he has ceased to be a subject of that State in pursuance of the laws thereof, or in pursuance of a treaty to that effect.

The said Secretary of State may in manner aforesaid grant a special certificate of naturalization to any person with respect to whose nationality as a British subject a doubt exists, and he may specify in such certificate that the grant thereof is made for the purpose of quieting doubts as to the right of such person to be a British subject, and the grant of such special certificate shall not be deemed to be any admis-

sion that the person to whom it was granted was not previously a British subject.

An alien who has been naturalized previously to the passing of this Act may apply to the Secretary of State for a certificate of naturalization under this Act, and it shall be lawful for the said Secretary of State to grant such certificate to such naturalized alien upon the same terms and subject to the same conditions in and upon which such certificate might have been granted if such alien had not been previously naturalized in the United Kingdom.

Certificate of re-admission to British nationality.

8. A natural-born British subject who has become an alien in pursuance of this Act, and is in this Act referred to as a statutory alien, may, on performing the same conditions and adducing the same evidence as is required in the case of an alien applying for a certificate of nationality, apply to one of Her Majesty's Principal Secretaries of State for a certificate herein-after referred to as a certificate of re-admission to British nationality, re-admitting him to the status of a British subject. The said Secretary of State shall have the same discretion as to the giving or withholding of the certificate as in the case of a certificate of naturalization, and an oath of allegiance shall in like manner be required previously to the issuing of the certificate.

A statutory alien to whom a certificate of re-admission to British nationality has been granted shall, from the date of the certificate of re-admission, but not in respect of any previous transaction, resume his position as a British subject; with this qualification, that within the limits of the foreign State of which he became a subject he shall not be deemed to be a British subject unless he has ceased to be a subject of that foreign State according to the laws thereof, or in pursuance of a treaty to that effect.

The jurisdiction by this Act conferred on the Secretary of State in the United Kingdom in respect of the grant of a certificate of re-admission to British nationality, in the case of any statutory alien being in any British possession, may be exercised by the governor of such possession; and residence in such possession shall, in the case of such person, be deemed equivalent to residence in the United Kingdom.

Form of oath of allegiance.

9. The oath in this Act referred to as the oath of allegiance shall be in the form following; that is to say,—

"I do swear that I will be faithful and bear "true allegiance to Her Majesty Queen Victoria, her heirs and suc-"cessors, according to law. So help me GOD."

National status of married women and infant children.

National status of married women and infant children.

10. The following enactments shall be made with respect to the national status of women and children:

(1.) A married woman shall be deemed to be a subject of the State of which her husband is for the time being a subject:

(2.) A widow being a natural-born British subject, who has become an alien by or in consequence of her marriage, shall be deemed to be a statutory alien, and may as such

at any time during widowhood obtain a certificate of re-admission to British nationality in manner provided by this Act:

(3.) Where the father being a British subject, or the mother being a British subject and a widow, becomes an alien in pursuance of this Act, every child of such father or mother who during infancy has become resident in the country where the father or mother is naturalized, and has, according to the laws of such country, become naturalized therein, shall be deemed to be a subject of the State of which the father or mother has become a subject, and not a British subject:

(4.) Where the father, or the mother being a widow, has obtained a certificate of re-admission to British nationality, every child of such father or mother who during infancy has become resident in the British dominions with such father or mother, shall be deemed to have resumed the position of a British subject to all intents:

(5.) Where the father, or the mother being a widow, has obtained a certificate of naturalization in the United Kingdom, every child of such father or mother who during infancy has become resident with such father or mother in any part of the United Kingdom, shall be deemed to be a naturalized British subject.

Supplemental Provisions.

Regulations as to registration.

11. One of Her Majesty's Principal Secretaries of State may by regulation provide for the following matters:

(1.) The form and registration of declarations of British nationality:

(2.) The form and registration of certificates of naturalization in the United Kingdom:

(3.) The form and registration of certificates of re-admission to British nationality:

(4.) The form and registration of declarations of alienage:

(5.) The registration by officers in the diplomatic or consular service of Her Majesty of the births and deaths of British subjects who may be born or die out of Her Majesty's dominions, and of the marriages of persons married at any of Her Majesty's embassies or legations:

(6.) The transmission to the United Kingdom for the purpose of registration or safe keeping, or of being produced as evidence of any declarations or certificates made in pursuance of this Act out of the United Kingdom, or of any copies of such declarations or certificates, also of copies of entries contained in any register kept out of the United Kingdom in pursuance of or for the purpose of carrying into effect the provisions of this Act:

(7.) With the consent of the Treasury the imposition and application of fees in respect of any registration authorized to

be made by this Act, and in respect of the making any declaration or the grant of any certificate authorized to be made or granted by this Act.

The said Secretary of State, by a further regulation, may repeal, alter, or add to any regulation previously made by him in pursuance of this section.

Any regulation made by the said Secretary of State in pursuance of this section shall be deemed to be within the powers conferred by this Act, and shall be of the same force as if it had been enacted in this Act, but shall not so far as respects the imposition of fees be in force in any British possession, and shall not, so far as respects any other matter, be in force in any British possession in which any Act or ordinance to the contrary of or inconsistent with any such direction may for the time being be in force.

Regulations as to evidence.

12. The following regulations shall be made with respect to evidence under this Act:—

(1.) Any declaration authorized to be made under this Act may be proved in any legal proceedings by the production of the original declaration, or of any copy thereof certified to be a true copy by one of Her Majesty's Principal Secretaries of State, or by any person authorized by regulations of one of Her Majesty's Principal Secretaries of State to give certified copies of such declaration, and the production of such declaration or copy shall be evidence of the person therein named as declarant having made the same at the date in the said declaration mentioned:

(2.) A certificate of naturalization may be proved in any legal proceeding by the production of the original certificate, or of any copy thereof certified to be a true copy by one of Her Majesty's Principal Secretaries of State, or by any person authorized by regulations of one of Her Majesty's Principal Secretaries of State to give certified copies of such certificate:

(3.) A certificate of re-admission to British nationality may be proved in any legal proceeding by the production of the original certificate, or of any copy thereof certified to be a true copy by one of Her Majesty's Principal Secretaries of State, or by any person authorized by regulations of one of Her Majesty's Principal Secretaries of State to give certified copies of such certificate:

(4.) Entries in any register authorized to be made in pursuance of this Act shall be proved by such copies and certified in such manner as may be directed by one of Her Majesty's Principal Secretaries of State, and the copies of such entries shall be evidence of any matters by this Act or by any regulation of the said Secretary of State authorized to be inserted in the register:

(5.) The Documentary Evidence Act, 1868, shall apply to any regulation made by a Secretary of State, in pursuance of or for the purpose of carrying into effect any of the provisions of this Act.

Miscellaneous.

13. Nothing in this Act contained shall affect the grant of letters of denization by Her Majesty. Saving of letters of denization.

14. Nothing in this Act contained shall qualify an alien to be the owner of a British ship. Saving as to British ships.

15. Where any British subject has in pursuance of this Act become an alien, he shall not thereby be discharged from any liability in respect of any acts done before the date of his so becoming an alien. Saving of allegiance prior to expatriation.

16. All laws, statutes, and ordinances which may be duly made by the legislature of any British possession for imparting to any person the privileges, or any of the privileges, of naturalization, to be enjoyed by such person within the limits of such possession, shall within such limits have the authority of law, but shall be subject to be confirmed or disallowed by Her Majesty in the same manner, and subject to the same rules in and subject to which Her Majesty has power to confirm or disallow any other laws, statutes, or ordinances in that possession Power of colonies to legislate with respect to naturalization.

17. In this Act, if not inconsistent with the context or subject-matter thereof,— Definition of terms.

"Disability" shall mean the status of being an infant, lunatic, idiot, or married woman:

"British possession" shall mean any colony, plantation, island, territory, or settlement within Her Majesty's dominions, and not within the United Kingdom, and all territories and places under one legislature are deemed to be one British possession for the purposes of this Act:

"The Governor of any British possession" shall include any person exercising the chief authority in such possession:

"Officer in the Diplomatic Service of Her Majesty" shall mean any Ambassador, Minister or Chargé d'Affaires, or Secretary of Legation, or any person appointed by such Ambassador, Minister, Chargé d'Affaires, or Secretary of Legation to execute any duties imposed by this Act on an officer in the Diplomatic Service of Her Majesty:

"Officer in the Consular Service of Her Majesty" shall mean and include Consul-General, Consul, Vice-Consul, and Consular Agent, and any person for the time being discharging the duties of Consul-General, Consul, Vice-Consul, and Consular Agent.

Repeal of Acts mentioned in Schedule.

18. The several Acts set forth in the first and second parts of the schedule annexed hereto shall be wholly repealed, and the Acts set forth in the third part of the said schedule shall be repealed to the extent therein mentioned; provided that the repeal enacted in this Act shall not affect— Repeal of Acts.

(1.) Any right acquired or thing done before the passing of this Act:

(2.) Any liability accruing before the passing of this Act:

(3.) Any penalty, forfeiture, or other punishment incurred or to be incurred in respect of any offence committed before the passing of this Act:

(4.) The institution of any investigation or legal proceeding or any other remedy for ascertaining or enforcing any such liability, penalty, forfeiture, or punishment as aforesaid.

SCHEDULE.

PART I.

ACTS WHOLLY REPEALED, OTHER THAN ACTS OF THE IRISH PARLIAMENT.

7 Jas. 1, c. 2.	13 Geo. 3, c. 25.	6 Geo. 4, c. 67.
11 Will. 3, c. 6 (a).	14 Geo. 3, c. 84.	7 & 8 Vict. c. 66.
13 Geo. 2, c. 7.	16 Geo. 3, c. 52.	10 & 11 Vict. c. 83.
20 Geo. 2, c. 44.		

PART II.

ACTS OF THE IRISH PARLIAMENT WHOLLY REPEALED.

14 & 15 Chas. 2, c. 13.	2 Anne, c. 14.	19 & 20 Geo. 3, c. 29.
23 & 24 Geo. 3, c. 38.	36 Geo. 3, c. 48.	

PART III.

ACTS PARTIALLY REPEALED.

4 Geo. 1, c. 9 (Act of Irish Parliament).	So far as it makes perpetual the Act of 2 Anne, c. 14.
6 Geo. 4, c. 50.	The whole of sect. 47.
3 & 4 Will. 4, c. 91.	The whole of sect. 37.

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35 & 36 VICT. c. 39.

An Act for amending the Law in certain cases in relation to Naturalization. [25th July, 1872.]

WHEREAS by a Convention between Her Majesty and the United States of America, supplementary to the Convention of the thirteenth day of May one thousand eight hundred and seventy, respecting naturalization, and signed at Washington on the twenty-third day of February one thousand eight hundred and seventy one, and a copy of which is contained in the schedule to this Act, provision is made in relation to the renunciation by the citizens and subjects therein men-

(a) 11 & 12 Wm. 3. (Ruff.)

tioned of naturalization or nationality in the presence of the officers therein mentioned:

And whereas doubts are entertained whether such provisions are altogether in accordance with "The Naturalization Act, 1870:" And whereas other doubts have arisen with respect to the effect of "The Naturalization Act, 1870," on the rights of women married before the passing of that Act; and it is expedient to remove such doubts:

Be it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

Short title.

1. This Act may be cited for all purposes as "The Naturalization Act, 1872," and this Act and "The Naturalization Act, 1870," may be cited together as "The Naturalization Acts, 1870 and 1872."

Confirmation of renunciation of nationality under the Convention.

2. Any renunciation of naturalization or of nationality made in manner provided by the said supplementary Convention by the persons and under the circumstances in the said Convention in that behalf mentioned shall be valid to all intents, and shall be deemed to be authorized by "The said Naturalization Act, 1870." This section shall be deemed to take effect from the date at which the said supplementary Convention took effect.

Saving clause as to property of married women.

3. Nothing contained in "The Naturalization Act, 1870," shall deprive any married woman of any estate or interest in real or personal property to which she may have become entitled previously to the passing of that Act, or affect such estate or interest to her prejudice.

SCHEDULE.

CONVENTION between Her Majesty and the United States of America, supplementary to the Convention of May 13, 1870, respecting Naturalization.

Signed at Washington, 23rd February, 1871.

[*Ratifications exchanged at Washington, May 4th,* 1871.]

WHEREAS by the second article of the Convention between Her Majesty the Queen of the United Kingdom of Great Britain and Ireland and the United States of America for regulating the citizenship of subjects and citizens of the contracting parties who have emigrated or may emigrate from the dominions of the one to those of the other party, signed at London, on the 13th of May, 1870, it was stipulated that the manner in which the renunciation by such subjects and citizens of their naturalization, and the resumption of their native allegiance, may be made and publicly declared, should be agreed upon by the governments of the respective countries; Her Majesty the Queen of the United Kingdom of Great Britain and Ireland and the President of the United States of America, for the purpose of effecting such agreement, have resolved to conclude a supplemental Convention, and

have named as their plenipotentiaries, that is to say; Her Majesty the Queen of the United Kingdom of Great Britain and Ireland, Sir Edward Thornton, Knight Commander of the Most Honourable Order of the Bath, and Her Envoy Extraordinary and Minister Plenipotentiary to the United States of America; and the President of the United States of America, Hamilton Fish, Secretary of State; who have agreed as follows:

Article I.

Any person being originally a citizen of the United States who had, previously to May 13, 1870, been naturalized as a British subject, may at any time before August 10, 1872, and any British subject who, at the date first aforesaid, had been naturalized as a citizen within the United States, may at any time before May 12, 1872, publicly declare his renunciation of such naturalization by subscribing an instrument in writing, substantially in the form hereunto appended, and designated as Annex (A).

Such renunciation by an original citizen of the United States, of British nationality, shall, within the territories and jurisdiction of the United States, be made in duplicate, in the presence of any court authorized by law for the time being to admit aliens to naturalization, or before the clerk or prothonotary of any such court; if the declarant be beyond the territories of the United States, it shall be made in duplicate, before any diplomatic or consular officer of the United States. One of such duplicates shall remain of record in the custody of the court or officer in whose presence it was made; the other shall be, without delay, transmitted to the department of State.

Such renunciation, if declared by an original British subject, of his acquired nationality as a citizen of the United States, shall, if the declarant be in the United Kingdom of Great Britain and Ireland, be made in duplicate, in the presence of a justice of peace; if elsewhere in Her Britannic Majesty's dominions, in triplicate, in the presence of any judge of civil or criminal jurisdiction, of any justice of the peace, or of any other officer for the time being authorized by law, in the place in which the declarant is, to administer an oath for any judicial or other legal purpose; if out of Her Majesty's dominions, in triplicate, in the presence of any officer in the diplomatic or consular service of Her Majesty.

Article II.

The contracting parties hereby engage to communicate each to the other, from time to time, lists of the persons who, within their respective dominions and territories, or before their diplomatic and consular officers, have declared their renunciation of naturalization, with the dates and places of making such declarations, and such information as to the abode of the declarants, and the times and places of their naturalization, as they may have furnished.

Article III.

The present Convention shall be ratified by Her Britannic Majesty, and by the President of the United States by and with the advice and

consent of the Senate thereof, and the ratifications shall be exchanged at Washington as soon as may be convenient.

In witness whereof, the respective plenipotentiaries have signed the same, and have affixed thereto their respective seals.

Done at Washington, the twenty-third day of February, in the year of our Lord one thousand eight hundred and seventy-one.

(L.S.) EDWD. THORNTON.
(L.S.) HAMILTON FISH.

ANNEX (A.)

I, *A. B.*, of (*insert abode*), being originally a citizen of the United States of America (*or a British subject*), and having become naturalized within the dominions of Her Britannic Majesty as a British subject (*or as a citizen within the United States of America*), do hereby renounce my naturalization as a British subject (*or citizen of the United States*); and declare that it is my desire to resume my nationality as a citizen of the United States (*or British subject*).

(Signed) *A. B.*

Made and subscribed before me in (*insert country or other subdivision, and State province, colony, legation, or consulate*), this day of , 187 .

(Signed) *E. F.*,
Justice of the Peace (*or other title*).

(L.S.) EDWD. THORNTON.
(L.S.) HAMILTON FISH.

II. AMERICAN ACT.

REVISED STATUTES. TITLE XXX.

Naturalization.

Sec. 2165. An alien may be admitted to become a citizen of the United States in the following manner, and not otherwise:— Aliens how naturalized.

(1.) He shall declare on oath, before a circuit or district court of the United States, or a district or supreme court of the territories, or a court of record of any of the States having common law jurisdiction, and a seal and clerk, two years at least prior to his admission, that it is *bonâ fide* his intention to become a citizen of the United States and to renounce for ever all allegiance and fidelity to any foreign prince, potentate, State, or sovereignty, and, particularly by name, to the prince, potentate, State, or sovereignty of which the alien may be at the time a citizen or subject (*b*). Declaration of intention. 14 April, 1802, v. 2, pp. 153, 155; 26 May, 1824, v. 4, p. 69.

(*b*) [*Campbell* v. *Gordon*, 6 Cranch, 176; *Stark* v. *Chesapeake Ins. Co.*, 7 Cranch, 420; *Chirack* v. *Chirack*, 2 Wheaton, 259; *Osborn* v. *U. S. Bank*, 9 Wheaton, 827; *Spratt* v. *Spratt*, 4 Peters, 393.]

Oath to support Constitution of the United States.
14 April, 1802, v. 2, p. 153.

(2.) He shall at the time of his application to be admitted, declare, on oath, before some one of the courts above specified, that he will support the Constitution of the United States, and that he absolutely and entirely renounces and abjures all allegiance and fidelity to every foreign prince, potentate, State, or sovereignty, and, particularly by name, to the prince, potentate, State, or sovereignty of which he was before a citizen or subject; which proceedings shall be recorded by the clerk of the court.

Residence in the United States, or State, and good moral character.

(3.) It shall be made to appear to the satisfaction of the court admitting such alien that he has resided within the United States five years at least, and within the State or Territory where such court is at the time held, one year at least; and that during that time he has behaved as a man of a good moral character, attached to the principles of the Constitution of the United States, and well disposed to the good order and happiness of the same; but the oath of the applicant shall in no case be allowed to prove his residence.

Titles of nobility renounced.

(4.) In case the alien applying to be admitted to citizenship has borne any hereditary title, or been of any of the orders of nobility in the kingdom or State from which he came, he shall, in addition to the above requisites, make an express renunciation of his title or order of nobility in the court to which his application is made, and his renunciation shall be recorded in the court.

Aliens honourably discharged from military service.
17 July, 1862, v. 12, p. 597.

Sec. 2166. Any alien of the age of 21 years and upwards, who has enlisted, or may enlist, in the armies of the United States, either the regular or volunteer forces, and has been, or may be hereafter, honourably discharged, shall be admitted to become a citizen of the United States, upon his petition, without any previous declaration of his intention to become such; and he shall not be required to prove more than one year's residence within the United States previous to his application to become such citizen; and the court admitting such alien shall, in addition to such proof of residence and good moral character, as now provided by law, be satisfied by competent proof of such person's having been honourably discharged from the service of the United States.

Minor residents.
26 May, 1824, v. 4, p. 69.

Sec. 2167. Any alien being under the age of 21 years, who has resided in the United States three years next preceding his arrival at that age, and who has continued to reside therein to the time he may make application to be admitted a citizen thereof, may after he arrives at the age of 21 years, and after he has resided five years within the United States, including the three years of his minority, be admitted a citizen of the United States without having made the declaration required in the first condition of sec. 2165, but such alien shall make the declaration required therein at the time of his admission; and shall further declare on oath, and prove to the satisfaction of the court, that, for two years next preceding, it has been his *bonâ fide* intention to become a citizen of the United States; and he shall in all respects comply with the laws in regard to naturalization.

Sec. 2168. When any alien, who has complied with the first condition in section 2165, dies before he is actually naturalized, the widow and the children of such alien shall be considered as citizens of the United States, and shall be entitled to all rights and privileges as such, upon taking the oaths prescribed by law.

Widow and children of declarants. 26 March, 1804, v. 2, p. 293.

Sec. 2169. The provisions of this title shall apply to aliens of African nativity, and to persons of African descent.

Alien of African nativity and descent. 14 July, 1870, v. 16, p. 256.

Sec. 2170. No alien shall be admitted to become a citizen who has not for the continued term of five years next preceding his admission resided within the United States.

Residence of five years in United States. 3 March, 1813, v. 2, p. 811.

Sec. 2171. No alien who is a native citizen or subject, or a denizen of any country, State, or sovereignty with which the United States are at war, at the time of his application, shall be then admitted to become a citizen of the United States.

Alien enemies not admitted. 14 April, 1802, v. 2, p. 153.

Sec. 2172. The children of persons who have been duly naturalized under any law of the United States, or who, previous to the passing of any law on that subject by the government of the United States, may have become citizens of any one of the States, under the laws thereof, being under the age of 21 years at the time of the naturalization of their parents, shall, if dwelling in the United States, be considered as citizens thereof, and the children of persons who now are or have been, citizens of the United States, shall, though born out of the limits and jurisdiction of the United States, be considered as citizens thereof (c).

Children of persons naturalized under certain laws to be citizens. 14 April, 1802, v. 2, p. 155.

By sec. 2174, foreign seamen who have served for three years on board a United States merchant vessel, may be naturalized.

30 July, 1813, v. 3, p. 53.

APPENDIX B.

ENGLISH AND AMERICAN EXTRADITION ACTS.

I. English Acts.—33 & 34 Vict. Chap. 52.

An Act for amending the Law relating to the Extradition of Criminals.

[9th August, 1870.]

Naturalization of seamen. 7 June, 1872, v. 17, p. 268.

Whereas it is expedient to amend the law relating to the surrender to foreign States of persons accused or convicted of the commission of certain crimes within the jurisdiction of such States, and to the trial of criminals surrendered by foreign States to this country:

Be it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

Preliminary.

1. This Act may be cited as "The Extradition Act, 1870."

Short title.

2. Where an arrangement has been made with any foreign State with respect to the surrender to such State of any fugitive criminals,

Where arrangement

(c) [*Campbell* v. *Gordon*, 6 Cranch, 176.]

for surrender of criminals made, Order in Council to apply Act.

Her Majesty may, by Order in Council, direct that this Act shall apply in the case of such foreign State.

Her Majesty may, by the same or any subsequent order, limit the operation of the order, and restrict the same to fugitive criminals who are in or suspected of being in the part of Her Majesty's dominions specified in the order, and render the operation thereof subject to such conditions, exceptions, and qualifications as may be deemed expedient.

Every such order shall recite or embody the terms of the arrangement, and shall not remain in force for any longer period than the arrangement.

Every such order shall be laid before both Houses of Parliament within six weeks after it is made, or, if Parliament be not then sitting, within six weeks after the then next meeting of Parliament, and shall also be published in the *London Gazette.*

Restrictions on surrender of criminals.

3. The following restrictions shall be observed with respect to the surrender of fugitive criminals :

(1.) A fugitive criminal shall not be surrendered if the offence in respect of which his surrender is demanded is one of a political character, or if he prove to the satisfaction of the police magistrate or the court before whom he is brought on habeas corpus, or to the Secretary of State, that the requisition for his surrender has in fact been made with a view to try or punish him for an offence of a political character :

(2.) A fugitive criminal shall not be surrendered to a foreign State unless provision is made by the law of that State, or by arrangement, that the fugitive criminal shall not, until he has been restored or had an opportunity of returning to Her Majesty's dominions, be detained or tried in that foreign State for any offence committed prior to his surrender other than the extradition crime proved by the facts on which the surrender is grounded :

(3.) A fugitive criminal who has been accused of some offence within English jurisdiction not being the offence for which his surrender is asked, or is undergoing sentence under any conviction in the United Kingdom, shall not be surrendered until after he has been discharged, whether by acquittal or on expiration of his sentence or otherwise :

(4.) A fugitive criminal shall not be surrendered until the expiration of fifteen days from the date of his being committed to prison to await his surrender.

Provisions of arrangement for surrender.

4. An Order in Council for applying this Act in the case of any foreign State shall not be made unless the arrangement—

(1.) provides for the determination of it by either party to it after the expiration of a notice not exceeding one year ; and

(2.) is in conformity with the provisions of this Act, and in particular with the restrictions on the surrender of fugitive criminals contained in this Act.

Publication and effect of order.

5. When an order applying this Act in the case of any foreign State has been published in the *London Gazette*, this Act (after the date specified in the order, or if no date is specified, after the date of the publi-

cation,) shall; so long as the order remains in force, but subject to the limitations, restrictions, conditions, exceptions, and qualifications, if any, contained in the order, apply in the case of such foreign State. An Order in Council shall be conclusive evidence that the arrangement therein referred to complies with the requisitions of this Act, and that this Act applies in the case of the foreign State mentioned in the order, and the validity of such order shall not be questioned in any legal proceedings whatever.

Liability of criminal to surrender.

6. Where this Act applies in the case of any foreign State, every fugitive criminal of that State who is in or suspected of being in any part of Her Majesty's dominions, or that part which is specified in the order applying this Act (as the case may be), shall be liable to be apprehended and surrendered in manner provided by this Act, whether the crime in respect of which the surrender is sought was committed before or after the date of the order, and whether there is or is not any concurrent jurisdiction in any Court of Her Majesty's dominions over that crime (*d*).

Order of Secretary of State for issue of warrant in United Kingdom if crime is not of a political character.

7. A requisition for the surrender of a fugitive criminal of any foreign State, who is in or suspected of being in the United Kingdom, shall be made to a Secretary of State by some person recognised by the Secretary of State as a diplomatic representative of that foreign State. A Secretary of State may, by order under his hand and seal, signify to a police magistrate that such requisition has been made, and require him to issue his warrant for the apprehension of the fugitive criminal.

If the Secretary of State is of opinion that the offence is one of a political character, he may, if he think fit, refuse to send any such order, and may also at any time order a fugitive criminal accused or convicted of such offence to be discharged from custody.

Issue of warrant by police magistrate, justice, &c.

8. A warrant for the apprehension of a fugitive criminal, whether accused or convicted of crime, who is in or suspected of being in the United Kingdom, may be issued—

(1.) by a police magistrate on the receipt of the said order of the Secretary of State, and on such evidence as would in his opinion justify the issue of the warrant if the crime had been committed or the criminal convicted in England; and

(2.) by a police magistrate or any justice of the peace in any part of the United Kingdom, on such information or complaint and such evidence or after such proceedings as would in the opinion of the person issuing the warrant justify the issue of a warrant if the crime had been committed or the criminal convicted in that part of the United Kingdom in which he exercises jurisdiction.

Any person issuing a warrant under this section without an order from a Secretary of State shall forthwith send a report of the fact of such issue, together with the evidence and information or complaint, or certified copies thereof, to a Secretary of State, who may if he think fit order the warrant to be cancelled, and the person who has been apprehended on the warrant to be discharged.

A fugitive criminal, when apprehended on a warrant issued without

(*d*) See sec. 2 of the next Act.

the order of a Secretary of State, shall be brought before some person having power to issue a warrant under this section, who shall by warrant order him to be brought and the prisoner shall accordingly be brought before a police magistrate.

A fugitive criminal apprehended on a warrant issued without the order of a Secretary of State shall be discharged by the police magistrate, unless the police magistrate, within such reasonable time as, with reference to the circumstances of the case, he may fix, receives from a Secretary of State an order signifying that a requisition has been made for the surrender of such criminal.

Hearing of case and evidence of political character of crime.

9. When a fugitive criminal is brought before the police magistrate, the police magistrate shall hear the case in the same manner, and have the same jurisdiction and powers, as near as may be, as if the prisoner were brought before him charged with an indictable offence committed in England.

The police magistrate shall receive any evidence which may be tendered to show that the crime of which the prisoner is accused or alleged to have been convicted is an offence of a political character or is not an extradition crime.

Committal or discharge of prisoner.

10. In the case of a fugitive criminal accused of an extradition crime, if the foreign warrant authorizing the arrest of such criminal is duly authenticated, and such evidence is produced as (subject to the provisions of this Act) would, according to the law of England, justify the committal for trial of the prisoner if the crime of which he is accused had been committed in England, the police magistrate shall commit him to prison, but otherwise shall order him to be discharged.

In the case of a fugitive criminal alleged to have been convicted of an extradition crime, if such evidence is produced as (subject to the provisions of this Act) would, according to the law of England, prove that the prisoner was convicted of such crime, the police magistrate shall commit him to prison, but otherwise shall order him to be discharged.

If he commits such criminal to prison, he shall commit him to the Middlesex House of Detention, or to some other prison in Middlesex, there to await the warrant of a Secretary of State for his surrender, and shall forthwith send to a Secretary of State a certificate of the committal, and such report upon the case as he may think fit.

Surrender of fugitive to foreign State by warrant of Secretary of State.

11. If the police magistrate commits a fugitive criminal to prison, he shall inform such criminal that he will not be surrendered until after the expiration of fifteen days, and that he has a right to apply for a writ of habeas corpus.

Upon the expiration of the said fifteen days, or, if a writ of habeas corpus is issued, after the decision of the court upon the return to the writ, as the case may be, or after such further period as may be allowed in either case by a Secretary of State, it shall be lawful for a Secretary of State, by warrant under his hand and seal, to order the fugitive criminal (if not delivered on the decision of the court) to be surrendered to such person as may in his opinion be duly authorized to receive the fugitive criminal by the foreign State from which the

requisition for the surrender proceeded, and such fugitive criminal shall be surrendered accordingly.

It shall be lawful for any person to whom such warrant is directed and for the person so authorized as aforesaid to receive, hold in custody, and convey within the jurisdiction of such foreign State the criminal mentioned in the warrant; and if the criminal escapes out of any custody to which he may be delivered on or in pursuance of such warrant, it shall be lawful to retake him in the same manner as any person accused of any crime against the laws of that part of Her Majesty's dominions to which he escapes may be retaken upon an escape.

Discharge of persons apprehended if not conveyed out of United Kingdom within two months.

12. If the fugitive criminal who has been committed to prison is not surrendered and conveyed out of the United Kingdom within two months after such committal, or, if a writ of habeas corpus is issued, after the decision of the court upon the return to the writ, it shall be lawful for any judge of one of Her Majesty's Superior Courts at Westminster, upon application made to him by or on behalf of the criminal, and upon proof that reasonable notice of the intention to make such application has been given to a Secretary of State, to order the criminal to be discharged out of custody, unless sufficient cause is shown to the contrary.

Execution of warrant of police magistrate.

13. The warrant of the police magistrate issued in pursuance of this Act may be executed in any part of the United Kingdom in the same manner as if the same had been originally issued or subsequently indorsed by a justice of the peace having jurisdiction in the place where the same is executed.

Depositions to be evidence. 6 & 7 Vict. c. 76.

14. Depositions or statements on oath, taken in a foreign State, and copies of such original depositions or statements, and foreign certificates of or judicial documents stating the fact of conviction, may, if duly authenticated, be received in evidence in proceedings under this Act.

Authentication of depositions and warrants. 29 & 30 Vict. c. 121.

15. Foreign warrants and depositions or statements on oath, and copies thereof, and certificates of or judicial documents stating the fact of a conviction, shall be deemed duly authenticated for the purposes of this Act if authenticated in manner provided for the time being by law or authenticated as follows:

(1.) If the warrant purports to be signed by a judge, magistrate, or officer of the foreign State where the same was issued;

(2.) If the depositions or statements or the copies thereof purport to be certified under the hand of a judge, magistrate, or officer of the foreign State where the same were taken to be the original depositions or statements, or to be true copies thereof, as the case may require; and

(3.) If the certificate of or judicial document stating the fact of conviction purports to be certified by a judge, magistrate, or officer of the foreign State where the conviction took place; and

if in every case the warrants, depositions, statements, copies, certificates, and judicial documents (as the case may be) are authenticated by the oath of some witness or by being sealed with the official seal of the minister of justice, or some other minister of state: And all Courts of

Justice, justices, and magistrates shall take judicial notice of such official seal, and shall admit the documents so authenticated by it to be received in evidence without further proof.

Crimes committed at Sea.

Jurisdiction as to crimes committed at sea.

16. Where the crime in respect of which the surrender of a fugitive criminal is sought was committed on board any vessel on the high seas which comes into any port of the United Kingdom, the following provisions shall have effect:

(1.) This Act shall be construed as if any stipendiary magistrate in England or Ireland, and any sheriff or sheriff substitute in Scotland, were substituted for the police magistrate throughout this Act, except the part relating to the execution of the warrant of the police magistrate:

(2.) The criminal may be committed to any prison to which the person committing him has power to commit persons accused of the like crime:

(3.) If the fugitive criminal is apprehended on a warrant issued without the order of a Secretary of State, he shall be brought before the stipendiary magistrate, sheriff, or sheriff substitute who issued the warrant, or who has jurisdiction in the port where the vessel lies, or in the place nearest to that port.

Fugitive Criminals in British Possessions.

Proceedings as to fugitive criminals in British possessions.

17. This Act, when applied by Order in Council, shall, unless it is otherwise provided by such order, extend to every British possession in the same manner as if throughout this Act the British possession were substituted for the United Kingdom or England, as the case may require, but with the following modifications; namely,

(1.) The requisition for the surrender of a fugitive criminal who is in or suspected of being in a British possession may be made to the governor of that British possession by any person recognized by that governor, as a consul general, consul, or vice-consul, or (if the fugitive criminal has escaped from a colony or dependency of the foreign State on behalf of which the requisition is made) as the governor of such colony or dependency:

(2). No warrant of a Secretary of State shall be required, and all powers vested in or acts authorized or required to be done under this Act by the police magistrate and the Secretary of State, or either of them, in relation to the surrender of a fugitive criminal, may be done by the governor of the British possession alone:

(3.) Any prison in the British possession may be substituted for a prison in Middlesex:

(4.) A judge of any court exercising in the British possession the like powers as the Court of Queen's Bench exercises in England may exercise the power of discharging a criminal when not conveyed within two months out of such British possession.

18. If by any law or ordinance, made before or after the passing of this Act by the Legislature of any British possession, provision is made for carrying into effect within such possession the surrender of fugitive criminals who are in or suspected of being in such British possession, Her Majesty may, by the Order in Council applying this Act in the case of any foreign State, or by any subsequent Order, either

Saving of laws of British possessions.

suspend the operation within any such British possession of this Act, or of any part thereof, so far as it relates to such foreign State, and so long as such law or ordinance continues in force, there, and no longer;

or direct that such law or ordinance, or any part thereof, shall have effect in such British possession, with or without modifications and alterations, as if it were part of this Act.

General Provisions.

19. Where, in pursuance of any arrangement with a foreign State, any person accused or convicted of any crime which, if committed in England, would be one of the crimes described in the first schedule to this Act is surrendered by that foreign State, such person shall not, until he has been restored or had an opportunity of returning to such foreign State, be triable or tried for any offence committed prior to the surrender in any part of Her Majesty's dominions other than such of the said crimes as may be proved by the facts on which the surrender is grounded.

Criminal surrendered by foreign State not triable for previous crime.

20. The forms set forth in the second schedule to this Act, or forms as near thereto as circumstances admit, may be used in all matters to which such forms refer, and in the case of a British possession may be so used, mutatis mutandis, and when used shall be deemed to be valid and sufficient in law.

As to use of forms in second schedule.

21. Her Majesty may, by Order in Council, revoke or alter, subject to the restrictions of this Act, any Order in Council made in pursuance of this Act, and all the provisions of this Act with respect to the original order shall (so far as applicable) apply, mutatis mutandis, to any such new order.

Revocation, &c., of Order in Council.

22. This Act (except so far as relates to the execution of warrants in the Channel Islands) shall extend to the Channel Islands and Isle of Man in the same manner as if they were part of the United Kingdom; and the royal courts of the Channel Islands are hereby respectively authorized and required to register this Act.

Application of Act in Channel Islands and Isle of Man.

23. Nothing in this Act shall affect the lawful powers of Her Majesty or of the Governor-General of India in Council to make treaties for the extradition of criminals with Indian native States, or with other Asiatic States conterminous with British India, or to carry into execution the provisions of any such treaties made either before or after the passing of this Act.

Saving for Indian treaties.

24. The testimony of any witness may be obtained in relation to any criminal matter pending in any Court or tribunal in a foreign State in like manner as it may be obtained in relation to any civil matter under the Act of the session of the nineteenth and twentieth years of the reign of Her present Majesty, chapter one hundred and thirteen, intituled

Power of foreign state to obtain evidence in United Kingdom.

"An Act to provide for taking evidence in Her Majesty's dominions in relation to civil and commercial matters pending before foreign tribunals;" and all the provisions of that Act shall be construed as if the term civil matter included a criminal matter, and the term cause included a proceeding against a criminal: Provided that nothing in this section shall apply in the case of any criminal matter of a political character.

Foreign State includes dependencies.

25. For the purposes of this Act, every colony, dependency, and constituent part of a foreign State, and every vessel of that State, shall (except where expressly mentioned as distinct in this Act) be deemed to be within the jurisdiction of and to be part of such foreign State.

Definition of terms.

26. In this Act, unless the context otherwise requires,—

"British possession:" The term "British possession" means any colony, plantation, island, territory, or settlement within Her Majesty's dominions, and not within the United Kingdom, the Channel Islands, and Isle of Man; and all colonies, plantations, islands, territories, and settlements under one legislature, as hereinafter defined, are deemed to be one British possession:

"Legislature:" The term "legislature" means any person or persons who can exercise legislative authority in a British possession, and where there are local legislatures as well as a central legislature, means the central legislature only:

"Governor:" The term "governor" means any person or persons administering the government of a British possession, and includes the governor of any part of India:

"Extradition crime:" The term "extradition crime" means a crime which, if committed in England or within English jurisdiction, would be one of the crimes described in the first schedule to this Act:

"Conviction:" The terms "conviction" and "convicted" do not include or refer to a conviction which under foreign law is a conviction for contumacy, but the term "accused person" includes a person so convicted for contumacy:

"Fugitive criminal:" The term "fugitive criminal" means any person accused or convicted of an extradition crime committed within the jurisdiction of any foreign State who is in or is suspected of being in some part of Her Majesty's dominions; and the term "fugitive criminal of a foreign State" means a fugitive criminal accused or convicted of an extradition crime committed within the jurisdiction of that State:

"Fugitive criminal of a foreign State:"

"Secretary of State:" The term "Secretary of State" means one of Her Majesty's Principal Secretaries of State:

"Police magistrate:" The term "police magistrate" means a chief magistrate of the metropolitan police courts, or one of the other magistrates of the metropolitan police court in Bow Street:

"Justice of peace:" The term "justice of the peace" includes in Scotland any sheriff, sheriff's substitute, or magistrate:

"Warrant." The term "warrant," in the case of any foreign State, includes any judicial document authorizing the arrest of a person accused or convicted of crime.

Repeal of Acts.

27. The Acts specified in the third schedule to this Act are hereby repealed as to the whole of Her Majesty's dominions; and this Act (with the exception of anything contained in it which is inconsistent with the treaties referred to in the Acts so repealed) shall apply (as regards crimes committed either before or after the passing of this Act), in the case of the foreign States with which those treaties are made, in the same manner as if an Order in Council referring to such treaties had been made in pursuance of this Act, and as if such order had directed that every law and ordinance which is in force in any British possession with respect to such treaties should have effect as part of this Act.

Repeal of Acts in third schedule.

Provided that if any proceedings for or in relation to the surrender of a fugitive criminal have been commenced under the said Acts previously to the repeal thereof, such proceedings may be completed, and the fugitive surrendered, in the same manner as if this Act had not passed.

SCHEDULES.

FIRST SCHEDULE.

List of Crimes.

The following list of crimes is to be construed according to the law existing in England, or in a British possession (as the case may be), at the date of the alleged crime, whether by common law or by statute made before or after the passing of this Act:

Murder, and attempt and conspiracy to murder.
Manslaughter.
Counterfeiting and altering money and uttering counterfeit or altered money.
Forgery, counterfeiting, and altering, and uttering what is forged or counterfeited or altered.
Embezzlement and larceny.
Obtaining money or goods by false pretences.
Crimes by bankrupts against bankruptcy law.
Fraud by a bailee, banker, agent, factor, trustee, or director, or member, or public officer of any company made criminal by any Act for the time being in force.
Rape.
Abduction.
Child stealing.
Burglary and housebreaking.
Arson.
Robbery with violence.
Threats by letter or otherwise with intent to extort.

Piracy by law of nations.

Sinking or destroying a vessel at sea, or attempting or conspiring to do so.

Assaults on board a ship on the high seas with intent to destroy life or to do grievous bodily harm.

Revolt or conspiracy to revolt by two or more persons on board a ship on the high seas against the authority of the master.

SECOND SCHEDULE.

Form of Order of Secretary of State to the Police Magistrate.

To the chief magistrate of the metropolitan police courts *or* other magistrate of the metropolitan police court in Bow Street [*or* the stipendiary magistrate at].

WHEREAS, in pursuance of an arrangement with referred to in an Order of Her Majesty in Council dated the day of , a requisition has been made to me, , one of Her Majesty's Principal Secretaries of State, by , the diplomatic representative of , for the surrender of late of , accused [*or* convicted] of the commission of the crime of within the jurisdiction of

Now I hereby, by this my order under my hand and seal, signify to you that such requisition has been made, and require you to issue your warrant for the apprehension of such fugitive, provided that the conditions of The Extradition Act, 1870, relating to the issue of such warrant, are in your judgment complied with.

Given under the hand and seal of the undersigned, one of Her Majesty's Principal Secretaries of State, this day of 18 .

Form of Warrant of Apprehension by Order of Secretary of State.

Metropolitan police district [*or* county *or* borough of] to wit. } To all and each of the constables of the metropolitan police force [*or* of the county *or* borough of].

WHEREAS the Right Honourable one of Her Majesty's Principal Secretaries of State, by order under his hand and seal, hath signified to me that requisition hath been duly made to him for the surrender of late of accused [*or* convicted] of the commission of the crime of within the jurisdiction of : This is therefore to command you in her Majesty's name forthwith to apprehend the said

pursuant to The Extradition Act, 1870, wherever he may be found in the United Kingdom or Isle of Man, and bring him before me or some other [* magistrate sitting in this court] to show cause why he should not be surrendered in pursuance of the said Extradition Act, for which this shall be your warrant.

Given under my hand and seal at [* Bow Street, one of the police courts of the metropolis] this day of 18 .

J. P.

* *Note.*—Alter as required.

Form of Warrant of Apprehension without Order of Secretary of State.

Metropolitan police district [*or* county *or* borough of] to wit. } To all and each of the constables of the metropolitan police force [*or* of the county *or* borough of].

WHEREAS it has been shown to the undersigned, one of Her Majesty's justices of the peace in and for the metropolitan police district [*or* the said county *or* borough of] that late of is accused [*or* convicted] of the commission of the crime of within the jurisdiction of : This is therefore to command you in Her Majesty's name forthwith to apprehend the said and to bring him before me or some other magistrate sitting at this court [*or* one of Her Majesty's justices of the peace in and for the county [*or* borough] of] to be further dealt with according to law, for which this shall be your warrant.

Given under my hand and seal at Bow Street, one of the police courts of the metropolis [*or* in the county *or* borough aforesaid], this day of 18 .

J. P.

Form of Warrant for bringing Prisoner before the Police Magistrate.

County [*or* borough] of to wit. } To constable of the police force of and to all other peace officers of the said county [*or* borough] of

WHEREAS late of accused [*or* alleged to be convicted] of the commission of the crime of within the jurisdiction of has been apprehended and brought before the undersigned, one of Her Majesty's justices of the peace in and for the said county [*or* borough] of

And whereas by The Extradition Act, 1870, he is required to be brought before the chief magistrate of the metropolitan police court, or one of the police magistrates of the metropolis sitting at Bow Street, within the metropolitan police district [*or* the stipendiary magistrate for]: This is therefore to command you, the said constable, in Her Majesty's name forthwith to take and convey the said to the metropolitan police district [*or* the said] and there carry him before the said chief magistrate or one of the police magistrates of the metropolis sitting at Bow Street within the said district [*or* before a stipendiary magistrate sitting in the said] to show cause why he should not be surrendered in pursuance of The Extradition Act, 1870, and otherwise to be dealt with in accordance with law, for which this shall be your warrant.

Given under my hand and seal at in the county [*or* borough] aforesaid, this day of 18 .

J. P.

Form of Warrant of Committal.

Metropolitan police district [*or* the county *or* borough of] to wit.	To one of the constables of the metropolitan police force [*or* of the police force of the county *or* borough of], and to the keeper of the

Be it remembered, that on this day of in the year of our Lord late of is brought before me the chief magistrate of the metropolitan police courts [*or* one of the police magistrates of the metropolis] sitting at the police court in Bow Street, within the metropolitan police district [*or* a stipendiary magistrate for], to show cause why he should not be surrendered in pursuance of The Extradition Act, 1870, on the ground of his being accused [*or* convicted] of the commission of the crime of within the jurisdiction of , and forasmuch as no sufficient cause has been shown to me why he should not be surrendered in pursuance of the said Act:

This is therefore to command you, the said constable, in Her Majesty's name forthwith to convey and deliver the body of the said into the custody of the said keeper of the at , and you the said keeper to receive the said into your custody, and him there safely to keep until he is thence delivered pursuant to the provisions of the said Extradition Act, for which this shall be your warrant.

Given under my hand and seal at Bow Street, one of the police courts of the metropolis [*or* at the said], this day of 18 .

J. P.

Form of Warrant of Secretary of State for Surrender of Fugitive.

To the keeper of and to

WHEREAS late of accused [*or* convicted] of the commission of the crime of within the jurisdiction of , was delivered into the custody of you the keeper of by warrant dated pursuant to the Extradition Act, 1870:

Now I do hereby, in pursuance of the said Act, order you the said keeper to deliver the body of the said into the custody of the said , and I command you the said to receive the said into your custody, and to convey him within the jurisdiction of the said , and there place him in the custody of any person or persons appointed by the said to receive him, for which this shall be your warrant.

Given under the hand and seal of the undersigned, one of Her Majesty's Principal Secretaries of State, this day of

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THIRD SCHEDULE.

Year and Chapter.	Title.
6 & 7 Vict. c. 75.	An Act for giving effect to a convention between Her Majesty and the King of the French for the apprehension of certain offenders.
6 & 7 Vict. c. 76.	An Act for giving effect to a treaty between Her Majesty and the United States of America for the apprehension of certain offenders.
8 & 9 Vict. c. 120.	An Act for facilitating execution of the treaties with France and the United States of America for the apprehension of certain offenders.
25 & 26 Vict. c. 70.	An Act for giving effect to a convention between Her Majesty and the King of Denmark for the mutual surrender of criminals.
29 & 30 Vict. c. 121.	An Act for the amendment of the law relating to treaties of extradition.

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36 & 37 VICT. CHAP. 60.

An Act to amend the Extradition Act, 1870. [5th August, 1873.]

BE it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and

Commons, in this present Parliament assembled, and by the authority of the same, as follows:

Construction of Act and short title. 33 & 34 Vict. c. 52.

1. This Act shall be construed as one with the Extradition Act, 1870, (in this Act referred to as the principal Act,) and the principal Act and this Act may be cited together as the Extradition Acts, 1870 and 1873, and this Act may be cited alone as the Extradition Act, 1873.

Explanation of sect. 6 of 33 & 34 Vict. c. 52.

2. Whereas by section six of the principal Act it is enacted as follows:

"Where this Act applies in the case of any foreign State, every fugitive criminal of that State who is in or suspected of being in any part of Her Majesty's dominions, or that part which is specified in the order applying this Act (as the case may be), shall be liable to be apprehended and surrendered in manner provided by this Act, whether the crime in respect of which the surrender is sought was committed before or after the date of the order, and whether there is or is not any concurrent jurisdiction in any Court of Her Majesty's dominions over that crime."

And whereas doubts have arisen as to the application of the said section to crimes committed before the passing of the principal Act, and it is expedient to remove such doubts, it is therefore hereby declared that—

A crime committed before the date of the order includes in the said section a crime committed before the passing of the principal Act, and the principal Act and this Act shall be construed accordingly.

Liability of accessories to be surrendered.

3. Whereas a person who is accessory before or after the fact, or counsels, procures, commands, aids, or abets the commission of any indictable offence, is by English law liable to be tried and punished as if he were the principal offender, but doubts have arisen whether such person as well as the principal offender can be surrendered under the principal Act, and it is expedient to remove such doubts; it is therefore hereby declared that—

Every person who is accused or convicted of having counselled, procured, commanded, aided, or abetted the commission of any extradition crime, or of being accessory before or after the fact to any extradition crime, shall be deemed for the purposes of the principal Act and this Act to be accused or convicted of having committed such crime, and shall be liable to be apprehended and surrendered accordingly.

Explanation of sect. 14 of 33 & 34 Vict. c. 52, as to statements on oath including affirmations.

4. Be it declared, that the provisions of the principal Act relating to depositions and statements on oath taken in a foreign State, and copies of such original depositions and statements, do and shall extend to affirmations taken in a foreign State, and copies of such affirmations.

Power of taking evidence in United Kingdom

5. A Secretary of State may, by order under his hand and seal, require a police magistrate or a justice of the peace to take evidence for the purposes of any criminal matter pending in any court or tribunal in any foreign State; and the police magistrate or justice of the peace, upon the receipt of such order, shall take the evidence of every witness appearing before him for the purpose in like manner as if such witness appeared on a charge against some defendant for an indictable offence, and shall certify at the foot of the depositions so taken that such evi-

dence was taken before him, and shall transmit the same to the Secretary of State; such evidence may be taken in the presence or absence of the person charged, if any, and the fact of such presence or absence shall be stated in such deposition. for foreign criminal matters.

Any person may, after payment or tender to him of a reasonable sum for his costs and expenses in this behalf, be compelled, for the purposes of this section, to attend and give evidence and answer questions and produce documents, in like manner and subject to the like conditions as he may in the case of a charge preferred for an indictable offence.

Every person who wilfully gives false evidence before a police magistrate or justice of the peace under this section shall be guilty of perjury.

Provided that nothing in this section shall apply in the case of any criminal matter of a political character.

6. The jurisdiction conferred by section sixteen of the principal Act on a stipendiary magistrate, and a sheriff or sheriff substitute, shall be deemed to be in addition to, and not in derogation or exclusion of, the jurisdiction of the police magistrate. Explanation of sect. 16 of 33 & 34 Vict. c. 52.

7. For the purposes of the principal Act and this Act a diplomatic representative of a foreign State shall be deemed to include any person recognised by the Secretary of State as a consul-general of that State, and a consul or vice-consul shall be deemed to include any person recognised by the governor of a British possession as a consular officer of a foreign State. Explanation of diplomatic representative and consul.

8. The principal Act shall be construed as if there were included in the first schedule to that Act the list of crimes contained in the schedule to this Act. Addition to list of crimes in schedule.

SCHEDULE.

LIST OF CRIMES.

The following list of crimes is to be construed according to the law existing in England or in a British possession (as the case may be) at the date of the alleged crime, whether by common law or by statute made before or after the passing of this Act:

Kidnapping and false imprisonment.

Perjury, and subornation of perjury, whether under common or statute law.

Any indictable offence under the Larceny Act, 1861, or any Act amending or substituted for the same, which is not included in the first schedule to the principal Act. 24 & 25 Vict. c. 96, &c.

Any indictable offence under the Act of the session of the twenty-fourth and twenty-fifth years of the reign of Her present Majesty, chapter ninety-seven, "To consolidate and amend the statute law of England and Ireland relating to malicious injuries to property," or any Act amending or substituted for the same, which is not included in the first schedule to the principal Act.

Any indictable offence under the Act of the session of the twenty-fourth and twenty-fifth years of the reign of Her present Majesty, chapter ninety-eight, "To consolidate and amend the statute law of England and Ireland, relating to indictable offences by forgery," or any Act amending or substituted for the same, which is not included in the first schedule to the principal Act.

Any indictable offence under the Act of the session of the twenty-fourth and twenty-fifth years of the reign of Her present Majesty, chapter ninety-nine, "To consolidate and amend the statute law of the United Kingdom against offences relating to the coin," or any Act amending or substituted for the same, which is not included in the first schedule to the principal Act.

Any indictable offence under the Act of the session of the twenty-fourth and twenty-fifth years of the reign of Her present Majesty, chapter one hundred, "To consolidate and amend the statute law of England and Ireland relating to offences against the person," or any Act amending or substituted for the same, which is not included in the first schedule to the principal Act.

Any indictable offence under the laws for the time being in force in relation to bankruptcy which is not included in the first schedule to the principal Act.

Existing English Extradition Treaties.

Extradition treaties are now in force between England and Austria (3rd December, 1873); Belgium (20th May, 1876, and 23rd July, 1877); Brazil (13th November, 1872); Denmark (31st March, 1873); France (14th August, 1876); Germany (14th May, 1872); Hayti (7th December, 1874); Honduras (6th January, 1874); Italy (5th February and 7th May, 1873); The Netherlands (10th June, 1874); Sweden and Norway (26th June, 1873); Switzerland (31st March, 1874); and the United States (9th August, 1842).

II.—AMERICAN ACT.

Revised Statutes, Title LXVI., Extradition.

Fugitives from the justice of a foreign country. 12th Aug. 1848, c. 167, s. 1, v. 9, p. 302.

Sec. 5270. Whenever there is a treaty or convention for extradition between the government of the United States and any foreign government, any justice of the Supreme Court, circuit judge, district judge, commissioner authorized to do so by any of the courts of the United States, or judge of a court of record of general jurisdiction of any State, may, upon complaint made under oath charging any person found within the limits of any State, district, or territory, with having committed within the jurisdiction of any such foreign government any of the crimes provided for by such treaty or convention, issue his warrant for the apprehension of the person so charged, that he may be brought before such justice, judge, or commissioner, to the end that the evidence of criminality may be heard and considered. If, on such hearing, he deems the evidence sufficient to sustain the charge under the provisions of the proper treaty or convention, he shall certify the same,

together with a copy of all the testimony taken before him, to the Secretary of State, that a warrant may issue upon the requisition of the proper authorities of such foreign government, for the surrender of such person, according to the stipulations of the treaty or convention; and he shall issue his warrant for the commitment of the person so charged to the proper jail, there to remain until such surrender shall be made (*f*).

Evidence on the hearing. 12th Aug. 1848, c. 167, s. 2, v. 9, p. 302. 22nd June, 1860, c. 184, v. 12, p. 84.

Sec. 5271. In every case of complaint, and of a hearing upon the return of the warrant of arrest, copies of the depositions, upon which an original warrant in any foreign country may have been granted, certified under the hand of the person issuing such warrant, and attested upon the oath of the party producing them to be true copies of the original depositions, may be received in evidence of the criminality of the person so apprehended, if they are authenticated in such manner as would entitle them to be received for similar purposes by the tribunals of the foreign country from which the accused party escaped. The certificate of the principal diplomatic officer or consular officer of the United States resident in such foreign country shall be proof that any paper or other document so offered is authenticated in the manner required by this section (*g*).

Surrender of the fugitive. 12th Aug. 1848, c. 167, s. 3, v. 9, p. 302.

Sec. 5272. It shall be lawful for the Secretary of State, under his hand and seal of office, to order the person so committed to be delivered to such person as shall be authorized, in the name and on behalf of such foreign government, to be tried for the crime of which such person shall be so accused, and such person shall be delivered up accordingly; and it shall be lawful for the person so authorized to hold such person in custody and to take him to the territory of such foreign government, pursuant to such treaty. If the person so accused shall escape out of any custody to which he shall be committed, or to which he shall be delivered, it shall be lawful to retake such person in the same manner as any person accused of any crime against the laws in force in that part of the United States to which he shall so escape, may be retaken on an escape (*h*).

Time allowed for extradition. V. 9, p. 303.

Sec. 5273. Whenever any person who is committed under this title, or any treaty, to remain until delivered up in pursuance of a requisition, is to be delivered up and conveyed out of the United States within two calendar months after such commitment, over and above the time actually required to convey the prisoner from the jail to which he was committed, by the readiest way, out of the United States, it shall be lawful for any judge of the United States, or of any State, upon application made to him by or on behalf of the person so committed, and upon proof made to him that reasonable notice of the intention to make such application has been given to the Secretary of State, to order the person so committed to be discharged out of custody, unless sufficient cause is shown to such judge why such discharge ought not to be ordered.

Continuance of

Sec. 5274. The provisions of this title relating to the surrender of

(*f*) [*In re Kaine*, 11 Howard, 103; *Ex parte Von Aerman*, 3 Blatchford, 160; *In re Heinrich*, 5 *ibid.* 414; *Case of J. F. Dos Santos*, 2 Brock, 493; *U. S.* v. *Davis*, 2 Sumner, 92; *The British Prisoners*, 1 Wood & M. 66.]

(*g*) [*In re Kaine*, 14 Howard, 103; *In re Heinrich*, 5 Blatchford, 414; *In re Francois Farez*, 7 *ibid.* 345.]

(*h*) [*In re Kaine*, 14 Howard, 103.]

provisions limited. *Ib.* 3rd March, 1869, c. 141, s. 1, v. 15, p. 337.

persons who have committed crimes in foreign countries, shall continue in force during the existence of any treaty of extradition with any foreign government, and no longer.

The other sections of this title (Secs. 5275 to 5280) relate to the mode in which a person demanded by the United States from a foreign country is to be protected and guarded, to fugitives from one State of the Union to another, and to the arrest of seamen deserting from ships in ports of the United States.

Existing American Extradition Treaties.

Besides the treaties with England and France mentioned in the text, the United States have extradition treaties with Austria (proclaimed 15th December, 1856); Baden (19th May, 1857); Bavaria (12th September, 1853); Belgium (1st May, 1874); Dominican Republic (24th October, 1867); Ecuador (24th December, 1873); German (North) Confederation (22nd February, 1868); Hayti (3rd November, 1864); Italy (30th September, 1868, and 11th May, 1869); Mexico (20th June, 1862); Nicaragua (25th June, 1870); Orange Free State (23rd August, 1873); Peru (27th July, 1874); Prussia (16th June, 1852, and 22nd February, 1868); Salvador (4th March, 1874); Spain (5th January, 1877); Sweden and Norway (21st December, 1860); Swiss Confederation (9th November, 1855); Turkey (11th August, 1874); Venezuela (25th September, 1861).

APPENDIX C.

ENGLISH AND AMERICAN FOREIGN ENLISTMENT ACTS.

I.—English Act.—33 & 34 Vict. Chap. 90.

An Act to regulate the conduct of Her Majesty's Subjects during the existence of hostilities between foreign States with which Her Majesty is at peace. [*9th August*, 1870.]

Whereas it is expedient to make provision for the regulation of the conduct of Her Majesty's subjects during the existence of hostilities between foreign States with which Her Majesty it at peace:

Be it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

Preliminary.

Short title of Act.

1. This Act may be cited for all purposes as "The Foreign Enlistment Act, 1870."

Application of Act.

2. This Act shall extend to all the dominions of Her Majesty, including the adjacent territorial waters.

Commence-

3. This Act shall come into operation in the United Kingdom im-

mediately on the passing thereof, and shall be proclaimed in every British possession by the governor thereof as soon as may be after he receives notice of this Act, and shall come into operation in that British possession on the day of such proclamation, and the time at which this Act comes into operation in any place is, as respects such place, in this Act referred to as the commencement of this Act.

ment of Act.

Illegal Enlistment.

4. If any person, without the license of Her Majesty, being a British subject, within or without Her Majesty's dominions, accepts or agrees to accept any commission or engagement in the military or naval service of any foreign State at war with any foreign State at peace with Her Majesty, and in this Act referred to as a friendly State, or whether a British subject or not within Her Majesty's dominions, induces any other person to accept or agree to accept any commission or engagement in the military or naval service of any such foreign State as aforesaid,—

Penalty on enlistment in service of foreign State.

He shall be guilty of an offence against this Act, and shall be punishable by fine and imprisonment, or either of such punishments, at the discretion of the Court before which the offender is convicted; and imprisonment, if awarded, may be either with or without hard labour.

5. If any person, without the license of Her Majesty, being a British subject, quits or goes on board any ship with a view of quitting Her Majesty's dominions, with intent to accept any commission or engagement in the military or naval service of any foreign State at war with a friendly State, or, whether a British subject or not, within Her Majesty's dominions, induces any other person to quit or to go on board any ship with a view of quitting Her Majesty's dominions with the like intent,—

Penalty on leaving Her Majesty's dominions with intent to serve a foreign State.

He shall be guilty of an offence against this Act, and shall be punishable by fine and imprisonment, or either of such punishments, at the discretion of the Court before which the offender is convicted; and imprisonment, if awarded, may be either with or without hard labour.

6. If any person induces any other person to quit Her Majesty's dominions or to embark on any ship within Her Majesty's dominions under a misrepresentation or false representation of the service in which such person is to be engaged, with the intent or in order that such person may accept or agree to accept any commission or engagement in the military or naval service of any foreign State at war with a friendly State,—

Penalty on embarking persons under false representations as to service.

He shall be guilty of an offence against this Act, and shall be punishable by fine and imprisonment, or either of such punishments, at the discretion of the Court before which the offender is convicted; and imprisonment, if awarded, may be either with or without hard labour.

7. If the master or owner of any ship, without the license of Her Majesty, knowingly either takes on board, or engages to take on board, or has on board such ship within Her Majesty's dominions any of the following persons, in this Act referred to as illegally enlisted persons; that is to say,

Penalty on taking illegally enlisted persons on board ship.

(1.) Any person who, being a British subject within or without the dominions of Her Majesty, has, without the license of Her Majesty, accepted or agreed to accept any commission or engagement in the military or naval service of any foreign State at war with any friendly State:

(2.) Any person, being a British subject, who, without the license of Her Majesty, is about to quit Her Majesty's dominions with intent to accept any commission or engagement in the military or naval service of any foreign State at war with a friendly State:

(3.) Any person who has been induced to embark under a misrepresentation or false representation of the service in which such person is to be engaged, with the intent or in order that such person may accept or agree to accept any commission or engagement in the military or naval service of any foreign State at war with a friendly State:

Such master or owner shall be guilty of an offence against this Act, and the following consequences shall ensue; that is to say,

(1.) The offender shall be punishable by fine and imprisonment, or either of such punishments, at the discretion of the Court before which the offender is convicted; and imprisonment, if awarded, may be either with or without hard labour: and

(2.) Such ship shall be detained until the trial and conviction or acquittal of the master or owner, and until all penalties inflicted on the master or owner have been paid, or the master or owner has given security for the payment of such penalties to the satisfaction of two justices of the peace, or other magistrate or magistrates having the authority of two justices of the peace: and

(3.) All illegally enlisted persons shall immediately on the discovery of the offence be taken on shore, and shall not be allowed to return to the ship.

Illegal Shipbuilding and Illegal Expeditions.

Penalty on illegal ship-building and illegal expeditions.

8. If any person within Her Majesty's dominions, without the license of Her Majesty, does any of the following acts; that is to say,

(1.) Builds or agrees to build, or causes to be built any ship with intent or knowledge, or having reasonable cause to believe that the same shall or will be employed in the military or naval service of any foreign State at war with any friendly State: or

(2.) Issues or delivers any commission for any ship with intent or knowledge, or having reasonable cause to believe that the same shall or will be employed in the military or naval service of any foreign State at war with any friendly State: or

(3.) Equips any ship with intent or knowledge, or having reasonable cause to believe that the same shall or will be employed in the military or naval service of any foreign State at war with any friendly State: or

(4.) Despatches, or causes or allows to be despatched, any ship with intent or knowledge, or having reasonable cause to believe that the same shall or will be employed in the military or naval service of any foreign State at war with any friendly State:

Such person shall be deemed to have committed an offence against this Act, and the following consequences shall ensue:

(1.) The offender shall be punishable by fine and imprisonment, or either of such punishments, at the discretion of the Court before which the offender is convicted; and imprisonment, if awarded, may be either with or without hard labour:

(2.) The ship in respect of which any such offence is committed, and her equipment, shall be forfeited to Her Majesty:

Provided that a person building, causing to be built, or equipping a ship in any of the cases aforesaid, in pursuance of a contract made before the commencement of such war as aforesaid, shall not be liable to any of the penalties imposed by this section in respect of such building or equipping if he satisfies the conditions following; that is to say,

(1.) If forthwith upon a proclamation of neutrality being issued by Her Majesty he gives notice to the Secretary of State that he is so building, causing to be built, or equipping such ship, and furnishes such particulars of the contract and of any matters relating to, or done, or to be done under the contract as may be required by the Secretary of State:

(2.) If he gives such security, and takes and permits to be taken such other measures, if any, as the Secretary of State may prescribe for ensuring that such ship shall not be despatched, delivered, or removed without the license of Her Majesty until the termination of such war as aforesaid.

Presumption as to evidence in case of illegal ship.

9. Where any ship is built by order of or on behalf of any foreign State when at war with a friendly State, or is delivered to or to the order of such foreign State, or any person who to the knowledge of the person building is an agent of such foreign State, or is paid for by such foreign State or such agent, and is employed in the military or naval service of such foreign State, such ship shall, until the contrary is proved, be deemed to have been built with a view to being so employed, and the burden shall lie on the builder of such ship of proving that he did not know that the ship was intended to be so employed in the military or naval service of such foreign State.

Penalty on aiding the warlike equipment of foreign ships.

10. If any person within the dominions of Her Majesty, and without the license of Her Majesty,—

By adding to the number of the guns, or by changing those on board for other guns, or by the addition of any equipment for war, increases or augments, or procures to be increased or augmented, or is knowingly concerned in increasing or augmenting the warlike force of any ship which at the time of her being within the dominions of Her Majesty was a ship in the military or naval service of any foreign State at war with any friendly State,—

Such person shall be guilty of an offence against this Act, and

shall be punishable by fine and imprisonment, or either of such punishments, at the discretion of the Court before which the offender is convicted; and imprisonment, if awarded, may be either with or without hard labour.

Penalty on fitting out naval or military expeditions without license.

11. If any person within the limits of Her Majesty's dominions, and without the license of Her Majesty,—

Prepares or fits out any naval or military expedition to proceed against the dominions of any friendly State, the following consequences shall ensue:

(1.) Every person engaged in such preparation or fitting out, or assisting therein, or employed in any capacity in such expedition, shall be guilty of an offence against this Act, and shall be punishable by fine and imprisonment, or either of such punishments, at the discretion of the Court before which the offender is convicted; and imprisonment, if awarded, may be either with or without hard labour.

(2.) All ships, and their equipments, and all arms and munitions of war, used in or forming part of such expedition, shall be forfeited to Her Majesty.

Punishment of accessories.

12. Any person who aids, abets, counsels, or procures the commission of any offence against this Act, shall be liable to be tried and punished as a principal offender.

Limitation of term of imprisonment

13. The term of imprisonment to be awarded in respect of any offence against this Act shall not exceed two years.

Illegal Prize.

Illegal prize brought into British ports restored.

14. If, during the continuance of any war in which Her Majesty may be neutral, any ship, goods, or merchandise captured as prize of war within the territorial jurisdiction of Her Majesty, in violation of the neutrality of this realm, or captured by any ship which may have been built, equipped, commissioned, or despatched, or the force of which may have been augmented, contrary to the provisions of this Act, are brought within the limits of Her Majesty's dominions by the captor, or any agent of the captor, or by any person having come into possession thereof with knowledge that the same was prize of war so captured as aforesaid, it shall be lawful for the original owner of such prize, or his agent, or for any person authorized in that behalf by the Government of the foreign State to which such owner belongs, to make application to the Court of Admiralty for seizure and detention of such prize, and the Court shall, on due proof of the facts, order such prize to be restored.

Every such order shall be executed and carried into effect in the same manner, and subject to the same right of appeal, as in case of any order made in the exercise of the ordinary jurisdiction of such Court; and in the meantime and until a final order has been made on such application the Court shall have power to make all such provisional and other orders as to the care or custody of such captured ship, goods, or merchandise, and (if the same be of perishable nature, or incurring risk of deterioration) for the sale thereof, and with respect to the deposit or investment of the proceeds of any such sale, as may be made by such Court in the exercise of its ordinary jurisdiction.

General Provision.

15. For the purposes of this Act, a license by Her Majesty shall be under the sign manual of Her Majesty, or be signified by Order in Council or by proclamation of Her Majesty.

License by Her Majesty, how granted.

Legal Procedure.

16. Any offence against this Act shall, for all purposes of and incidental to the trial and punishment of any person guilty of any such offence, be deemed to have been committed either in the place in which the offence was wholly or partly committed, or in any place within Her Majesty's dominions in which the person who committed such offence may be.

Jurisdiction in respect of offences by persons against Act.

17. Any offence against this Act may be described in any indictment or other document relating to such offence, in cases where the mode of trial requires such a description, as having been committed at the place where it was wholly or partly committed, or it may be averred generally to have been committed within Her Majesty's dominions, and the venue or local description in the margin may be that of the county, city, or place in which the trial is held.

Venue in respect of offences by persons. 24 & 25 Vict. c. 97.

18. The following authorities, that is to say, in the United Kingdom any judge of a Superior Court, in any other place within the jurisdiction of any British court of justice, such Court, or, if there are more courts than one, the Court having the highest criminal jurisdiction in that place, may, by warrant or instrument in the nature of a warrant in this section included in the term "warrant," direct that any offender charged with an offence against this Act shall be removed to some other place in Her Majesty's dominions for trial in cases where it appears to the authority granting the warrant that the removal of such offender would be conducive to the interests of justice, and any prisoner so removed shall be triable at the place to which he is removed, in the same manner as if his offence had been committed at such place.

Power to remove offenders for trial.

Any warrant for the purposes of this section may be addressed to the master of any ship or to any other person or persons, and the person or persons to whom such warrant is addressed shall have power to convey the prisoner therein named to any place or places named in such warrant, and to deliver him, when arrived at such place or places, into the custody of any authority designated by such warrant.

Every prisoner shall, during the time of his removal under any such warrant as aforesaid, be deemed to be in the legal custody of the person or persons empowered to remove him.

19. All proceedings for the condemnation and forfeiture of a ship, or ship and equipment, or arms and munitions of war, in pursuance of this Act shall require the sanction of the Secretary of State or such chief executive authority as is in this Act mentioned, and shall be had in the Court of Admiralty, and not in any other Court; and the Court of Admiralty shall, in addition to any power given to the Court by this Act, have in respect of any ship or other matter brought before it in pursuance of this Act all powers which it has in the

Jurisdiction in respect of forfeiture of ships for offences against Act.

case of a ship or matter brought before it in the exercise of its ordinary jurisdiction.

Regulations as to proceedings against the offender and against the ship.

20. Where any offence against this Act has been committed by any person by reason whereof a ship, or ship and equipment, or arms and munitions of war, has or have become liable to forfeiture, proceedings may be instituted contemporaneously or not, as may be thought fit, against the offender in any Court having jurisdiction of the offence, and against the ship, or ship and equipment, or arms and munitions of war, for the forfeiture in the Court of Admiralty; but it shall not be necessary to take proceedings against the offender because proceedings are instituted for the forfeiture, or to take proceedings for the forfeiture because proceedings are taken against the offender.

Officers authorized to seize offending ships.

21. The following officers, that is to say,

(1.) Any officer of Customs in the United Kingdom, subject nevertheless to any special or general instructions from the Commissioners of Customs or any officer of the Board of Trade, subject nevertheless to any special or general instructions from the Board of Trade:

(2.) Any officer of Customs or public officer in any British possession, subject nevertheless to any special or general instructions from the governor of such possession:

(3.) Any commissioned officer on full pay in the military service of the Crown, subject nevertheless to any special or general instructions from his commanding officer:

(4.) Any commissioned officer on full pay in the naval service of the Crown, subject nevertheless to any special or general instructions from the Admiralty or his superior officer,

may seize or detain any ship liable to be seized or detained in pursuance of this Act, and such officers are in this Act referred to as the "local authority;" but nothing in this Act contained shall derogate from the power of the Court of Admiralty to direct any ship to be seized or detained by any officer by whom such Court may have power under its ordinary jurisdiction to direct a ship to be seized or detained.

Powers of officers authorized to seize ships.

22. Any officer authorized to seize or detain any ship in respect of any offence against this Act may, for the purpose of enforcing such seizure or detention, call to his aid any constable or officers of police, or any officers of Her Majesty's army or navy or marines, or any excise officers or officers of Customs, or any harbour-master or dock-master, or any officers having authority by law to make seizures of ships, and may put on board any ship so seized or detained any one or more of such officers to take charge of the same, and to enforce the provisions of this Act, and any officer seizing or detaining any ship under this Act may use force, if necessary, for the purpose of enforcing seizure or detention, and if any person is killed or maimed by reason of his resisting such officer in the execution of his duties, or any person acting under his orders, such officer so seizing or detaining the ship, or other person, shall be freely and fully indemnified as well against the Queen's Majesty, her heirs and successors, as against all persons so killed, maimed, or hurt.

Special

23. If the Secretary of State or the chief executive authority is

satisfied that there is a reasonable and probable cause for believing that a ship within Her Majesty's dominions has been or is being built, commissioned, or equipped contrary to this Act, and is about to be taken beyond the limits of such dominions, or that a ship is about to be despatched contrary to this Act, such Secretary of State or chief executive authority shall have power to issue a warrant stating that there is reasonable and probable cause for believing as aforesaid, and upon such warrant the local authority shall have power to seize and search such ship, and to detain the same until it has been either condemned or released by process of law, or in manner herein-after mentioned.

power of Secretary of State or chief executive authority to detain ship.

The owner of the ship so detained, or his agent, may apply to the Court of Admiralty for its release, and the Court shall as soon as possible put the matter of such seizure and detention in course of trial between the applicant and the Crown.

If the applicant establish to the satisfaction of the Court that the ship was not and is not being built, commissioned, or equipped, or intended to be despatched contrary to this Act, the ship shall be released and restored.

If the applicant fail to establish to the satisfaction of the Court that the ship was not and is not being built, commissioned, or equipped, or intended to be despatched contrary to this Act, then the ship shall be detained till released by order of the Secretary of State or chief executive authority.

The Court may in cases where no proceedings are pending for its condemnation, release any ship detained under this section on the owner giving security to the satisfaction of the Court that the ship shall not be employed contrary to this Act, notwithstanding that the applicant may have failed to establish to the satisfaction of the Court that the ship was not and is not being built, commissioned, or intended to be despatched contrary to this Act. The Secretary of State or the chief executive authority may likewise release any ship detained under this section on the owner giving security to the satisfaction of such Secretary of State or chief executive authority that the ship shall not be employed contrary to this Act, or may release the ship without such security if the Secretary of State or chief executive authority think fit so to release the same.

If the Court be of opinion that there was not reasonable and probable cause for the detention, and if no such cause appear in the course of the proceedings, the Court shall have power to declare that the owner is to be indemnified by the payment of costs and damages in respect of the detention, the amount thereof to be assessed by the Court, and any amount so assessed shall be payable by the Commissioners of the Treasury out of any moneys legally applicable for that purpose. The Court of Admiralty shall also have power to make a like order for the indemnity of the owner, on the application of such owner to the Court, in a summary way, in cases where the ship is released by the order of the Secretary of State or the chief executive authority, before any application is made by the owner or his agent to the Court for such release.

Nothing in this section contained shall affect any proceedings insti-

tuted or to be instituted for the condemnation of any ship detained under this section where such ship is liable to forfeiture, subject to this provision, that if such ship is restored in pursuance of this section, all proceedings for such condemnation shall be stayed; and where the Court declares that the owner is to be indemnified by the payment of costs and damages for the detainer, all costs, charges, and expenses incurred by such owner in or about any proceedings for the condemnation of such ship shall be added to the costs and damages payable to him in respect of the detention of the ship.

Nothing in this section contained shall apply to any foreign non-commissioned ship despatched from any part of Her Majesty's dominions after having come within them under stress of weather or in the course of a peaceful voyage, and upon which ship no fitting out or equipping of a warlike character has taken place in this country.

Special power of local authority to detain ship.

24. Where it is represented to any local authority, as defined by this Act, and such local authority believes the representation, that there is a reasonable and probable cause for believing that a ship within Her Majesty's dominions has been or is being built, commissioned, or equipped contrary to this Act, and is about to be taken beyond the limits of such dominions, or that a ship is about to be despatched contrary to this Act, it shall be the duty of such local authority to detain such ship, and forthwith to communicate the fact of such detention to the Secretary of State or chief executive authority.

Upon the receipt of such communication, the Secretary of State or chief executive authority may order the ship to be released if he thinks there is no cause for detaining her, but if satisfied that there is reasonable and probable cause for believing that such ship was built, commissioned, or equipped or intended to be despatched in contravention of this Act, he shall issue his warrant stating that there is reasonable and probable cause for believing as aforesaid, and upon such warrant being issued further proceedings shall be had as in cases where the seizure or detention has taken place on a warrant issued by the Secretary of State without any communication from the local authority.

Where the Secretary of State or chief executive authority orders the ship to be released on the receipt of a communication from the local authority without issuing his warrant, the owner of the ship shall be indemnified by the payment of costs and damages in respect of the detention upon application to the Court of Admiralty in a summary way in like manner as he is entitled to be indemnified where the Secretary of State having issued his warrant under this Act releases the ship before any application is made by the owner or his agent to the Court for such release.

Power of Secretary of State or executive authority to grant search warrant.

25. The Secretary of State or the chief executive authority may, by warrant, empower any person to enter any dockyard or other place within Her Majesty's dominions and inquire as to the destination of any ship which may appear to him to be intended to be employed in the naval or military service of any foreign State at war with a friendly State, and to search such ship.

Exercise of

26. Any powers or jurisdiction by this Act given to the Secretary of State may be exercised by him throughout the dominions of Her

Majesty, and such powers and jurisdiction may also be exercised by any of the following officers, in this Act referred to as the chief executive authority, within their respective jurisdictions; that is to say,

powers of Secretary of State or chief executive authority.

(1.) In Ireland by the Lord Lieutenant or other the chief governor or governors of Ireland for the time being, or the chief secretary to the Lord Lieutenant:

(2.) In Jersey by the Lieutenant Governor:

(3.) In Guernsey, Alderney, and Sark, and the dependent islands by the Lieutenant Governor:

(4.) In the Isle of Man by the Lieutenant Governor:

(5.) In any British possession by the Governor.

A copy of any warrant issued by a Secretary of State or by any officer authorized in pursuance of this Act to issue such warrant in Ireland, the Channel Islands, or the Isle of Man shall be laid before Parliament.

Appeal from Court of Admiralty.

27. An appeal may be had from any decision of a Court of Admiralty under this Act to the same tribunal and in the same manner to and in which an appeal may be had in cases within the ordinary jurisdiction of the Court as a Court of Admiralty.

Indemnity to officers.

28. Subject to the provisions of this Act providing for the award of damages in certain cases in respect of the seizure or detention of a ship by the Court of Admiralty no damages shall be payable, and no officer or local authority shall be responsible, either civilly or criminally, in respect of the seizure or detention of any ship in pursuance of this Act.

Indemnity to Secretary of State or chief executive authority.

29. The Secretary of State shall not, nor shall the chief executive authority, be responsible in any action or other legal proceedings whatsoever for any warrant issued by him in pursuance of this Act, or be examinable as a witness, except at his own request, in any court of justice in respect of the circumstances which led to the issue of the warrant.

Interpretation Clause.

Interpretation of terms.

30. In this Act, if not inconsistent with the context, the following terms have the meanings herein-after respectively assigned to them; that is to say,

"Foreign State:"

"Foreign State" includes any foreign prince, colony, province, or part of any province or people, or any person or persons exercising or assuming to exercise the powers of government in or over any foreign country, colony, province, or part of any province or people:

"Military service:"

"Military service" shall include military telegraphy and any other employment whatever, in or in connexion with any military operation:

"Naval service:"

"Naval service" shall, as respects a person, include service as a marine, employment as a pilot in piloting or directing the course of a ship of war or other ship when such ship of war or other ship is being used in any military or naval operation, and any employment whatever on board a ship of war, transport, store ship, privateer or ship under letters of

marque; and as respects a ship, include any user of a ship as a transport, store ship, privateer or ship under letters of marque:

"United Kingdom:" "United Kingdom" includes the Isle of Man, the Channel Islands, and other adjacent islands:

"British possession:" "British possession" means any territory, colony, or place being part of Her Majesty's dominions, and not part of the United Kingdom, as defined by this Act:

"The Secretary of State:" "The Secretary of State" shall mean any one of Her Majesty's Principal Secretaries of State:

"Governor:" "The Governor" shall as respects India mean the Governor-General or the governor of any presidency, and where a British possession consists of several constituent colonies, mean the Governor-General of the whole possession, or the governor of any of the constituent colonies, and as respects any other British possession it shall mean the officer for the time being administering the government of such possession; also any person acting for or in the capacity of a governor, shall be included under the term "Governor":

"Court of Admiralty:" "Court of Admiralty" shall mean the High Court of Admiralty of England or Ireland, the Court of Session of Scotland, or any Vice-Admiralty Court within Her Majesty's dominions:

"Ship:" "Ship" shall include any description of boat, vessel, floating battery, or floating craft; also any description of boat, vessel, or other craft or battery, made to move either on the surface of or under water, or sometimes on the surface of and sometimes under water:

"Building:" "Building" in relation to a ship shall include the doing any act towards or incidental to the construction of a ship, and all words having relation to building shall be construed accordingly:

"Equipping:" "Equipping" in relation to a ship shall include the furnishing a ship with any tackle, apparel, furniture, provisions, arms, munitions, or stores, or any other thing which is used in or about a ship for the purpose of fitting or adapting her for the sea or for naval service, and all words relating to equipping shall be construed accordingly:

"Ship and equipment:" "Ship and equipment" shall include a ship and everything in or belonging to a ship:

"Master." "Master" shall include any person having the charge or command of a ship.

Repeal of Acts and Saving Clauses.

Repeal of Foreign Enlistment Act. 59 G. 3, c. 69.

31. From and after the commencement of this Act, an Act passed in the fifty-ninth year of the reign of His late Majesty King George the Third, chapter sixty-nine, intituled "An Act to prevent the enlisting or engagement of His Majesty's subjects to serve in foreign service, and the fitting out or equipping, in His Majesty's dominions, vessels for warlike purposes, without His Majesty's license," shall be repealed: Provided that such repeal shall not affect any penalty, for-

feiture, or other punishment incurred or to be incurred in respect of any offence committed before this Act comes into operation, nor the institution of any investigation or legal proceeding, or any other remedy for enforcing any such penalty, forfeiture, or punishment as aforesaid.

Saving as to commissioned foreign ships.

32. Nothing in this Act contained shall subject to forfeiture any commissioned ship of any foreign State, or give to any British Court over or in respect of any ship entitled to recognition as a commissioned ship of any foreign State any jurisdiction which it would not have had if this Act had not passed.

Penalties not to extend to persons entering into military service in Asia.

33. Nothing in this Act contained shall extend or be construed to extend to subject to any penalty any person who enters into the military service of any prince, State, or potentate in Asia, with such leave or license as is for the time being required by law in the case of subjects of Her Majesty entering into the military service of princes, States, or potentates in Asia.

59 G. 3, c. 69, s. 12.

II.—American Act.

An Act in addition to the "Act for the Punishment of certain Crimes against the United States," and to repeal the Acts therein mentioned (1818) (*i*).

Be it enacted by the Senate and House of Representatives of the United States of America, in Congress assembled, That if any citizen of the United States shall, within the territory or jurisdiction thereof, accept and exercise a commission to serve a foreign prince, State, colony, district, or people, in war, by land or by sea, against any prince, State, colony, district, or people, with whom the United States are at peace, the person so offending shall be deemed guilty of a high misdemeanour, and shall be fined not more than two thousand dollars, and shall be imprisoned not exceeding three years.

Sect. 2. And be it further enacted, That if any person shall, within the territory or jurisdiction of the United States, enlist or enter himself, or hire or retain another person to enlist or enter himself, or to go beyond the limits or jurisdiction of the United States with intent to be enlisted or entered in the service of any foreign prince, State, colony, district, or people, as a soldier, or as a marine or seaman, on board of any vessel of war, letter of marque, or privateer, every person so offending shall be deemed guilty of a high misdemeanour, and shall be fined not exceeding one thousand dollars, and be imprisoned not exceeding three years: Provided, that this Act shall not be construed to extend to any subject or citizen of any foreign prince, State, colony, district, or people, who shall transiently be within the United States, and shall on board of any vessel of war, letter of marque,

(*i*) [This Act is given as it was originally passed in order to retain the numbering of the sections referred to in the text. It will be found in the U.S. Revised Statutes under the title of Neutrality.]

or privateer, which at the time of its arrival within the United States, was fitted and equipped as such, enter and enlist himself, or hire or retain another subject or citizen of the same foreign prince, State, colony, district, or people, who is transiently within the United States, to enlist or enter himself to serve such foreign prince, State, colony, district, or people, on board such vessel of war, letter of marque, or privateer, if the United States shall then be at peace with such foreign prince, State, colony, district, or people.

Sect. 3. And be it further enacted, That if any person shall, within the limits of the United States, fit out and arm, or attempt to fit out and arm, or procure to be fitted out and armed, or shall knowingly be concerned in the furnishing, fitting out, or arming, of any ship or vessel with intent that such ship or vessel shall be employed in the service of any foreign prince or State, or of any colony, district, or people, to cruise or commit hostilities against the subjects, citizens, or property of any foreign prince or State, or of any colony, district, or people with whom the United States are at peace, or shall issue or deliver a commission within the territory or jurisdiction of the United States, for any ship or vessel, to the intent that she may be employed as aforesaid, every person so offending shall be guilty of a high misdemeanour, and shall be fined not more than ten thousand dollars, and imprisoned not more than three years; and every such ship or vessel, with her tackle, apparel, and furniture, together with all materials, arms, ammunition, and stores, which may have been procured for the building and equipment thereof, shall be forfeited; one-half to the use of the informer, and the other half to the use of the United States.

Sect. 4. And be it further enacted, That if any citizen or citizens of the United States shall, without the limits thereof, fit out and arm, or attempt to fit out and arm, or procure to be fitted out and armed, or shall knowingly aid or be concerned in the furnishing, fitting out, or arming, any private ship or vessel of war, or privateer, with intent that such ship or vessel shall be employed to cruise, or commit hostilities, upon the citizens of the United States, or their property, or shall take the command of, or enter on board of any such ship or vessel, for the intent aforesaid, or shall purchase any interest in any such ship or vessel, with a view to share in the profits thereof, such persons so offending shall be deemed guilty of a high misdemeanour, and fined not more than ten thousand dollars, and imprisoned not more than ten years; and the trial for such offence, if committed within the limits of the United States, shall be in the district in which the offender shall be apprehended or first brought.

Sect. 5. And be it further enacted, That if any persons shall, within the territory or jurisdiction of the United States, increase or augment, or procure to be increased or augmented, or shall knowingly be concerned in increasing or augmenting the force of any ship of war, cruiser, or other armed vessel, which, at the time of her arrival within the United States, was a ship of war, or cruiser, or armed vessel, in the service of any foreign prince or State, or of any colony, district, or people, or belonging to the subjects or citizens of any such prince or State, colony, district, or people, the same being at war with any foreign prince or State, or of any colony, district, or people with whom

the United States are at peace, by adding to the number of the guns of such vessel, or by changing those on board of her for guns of a larger calibre, or by the addition thereto of any equipment solely applicable to war, every person so offending shall be deemed guilty of a high misdemeanour, shall be fined not more than one thousand dollars, and be imprisoned not more than one year.

Sect. 6. And be it further enacted, That if any person shall, within the territory or jurisdiction of the United States, begin or set on foot, or provide or prepare the means for any military expedition or enterprise, to be carried on from thence against the territory or dominions of any foreign prince or State, or of any colony, district, or people, with whom the United States are at peace, every person so offending shall be deemed guilty of a high misdemeanour, and shall be fined not exceeding three thousand dollars, and be imprisoned not more than one year.

Sect. 7. And be it further enacted, That the District Courts shall take cognizance of complaints, by whomsoever instituted, in cases of captures made within the waters of the United States, or within a marine league of the coasts or shores thereof.

Sect. 8. And be it further enacted, That in every case in which a vessel shall be fitted out and armed, or attempted to be fitted out and armed, or in which the force of any vessel of war, cruiser, or other armed vessel, shall be increased or augmented, or in which any military expedition or enterprise shall be begun or set on foot, contrary to the provisions and prohibitions of this Act; and in every case of the capture of a ship or vessel within the jurisdiction or protection of the United States as before defined, and in every case in which any process issuing out of any Court of the United States shall be disobeyed or resisted by any person or persons having the custody of any vessel of war, cruiser, or other armed vessel of any foreign prince or State, or of any colony, district, or people, or of any subjects or citizens of any foreign prince or State, or of any colony, district, or people, in every case it shall be lawful for the President of the United States, or such other person as he shall have empowered for that purpose, to employ such part of the land or naval forces of the United States, or of the militia thereof, for the purpose of taking possession of and detaining any such ship or vessel, with her prize or prizes, if any, in order to the execution of the prohibitions and penalties of this Act, and to the restoring the prize or prizes in the cases in which restoration shall have been adjudged, and also for the purpose of preventing the carrying on any such expedition or enterprise from the territories or jurisdiction of the United States against the territories or dominions of any foreign prince or State, or of any colony, district, or people, with whom the United States are at peace.

Sect. 9. And be it further enacted, That it shall be lawful for the President of the United States, or such person as he shall empower for that purpose, to employ such part of the land or naval forces of the United States, or of the militia thereof, as shall be necessary to compel any foreign ship or vessel to depart the United States in all cases in which by the law of nations or the Treaties of the United States, they ought not to remain within the United States.

Sect. 10. And be it further enacted, That the owners or consignees of every armed ship or vessel sailing out of the ports of the United States, belonging wholly or in part to citizens thereof, shall enter into bond to the United States, with sufficient sureties, prior to clearing out the same, in double the amount of the value of the vessel and cargo on board, including her armament, that the said ship or vessel shall not be employed by such owners to cruise or commit hostilities against the subjects, citizens, or property, of any foreign prince or State, or of any colony, district, or people, with whom the United States are at peace.

Sect. 11. And be it further enacted, That the collectors of the Customs be, and they are, hereby respectively authorized and required to detain any vessel manifestly built for warlike purposes, and about to depart the United States, of which the cargo shall principally consist of arms and munitions of war, when the number of men shipped on board, or other circumstances, shall render it probable that such vessel is intended to be employed by the owner or owners to cruise or commit hostilities upon the subjects, citizens, or property of any foreign State, or of any Colony, district, or people, with whom the United States are at peace, until the decision of the President be had thereon, or until the owner or owners shall give such bond and security as is required of the owners of armed ships by the preceding section of this Act.

Sect. 12. And be it further enacted, That the Act passed on the fifth day of June One thousand seven hundred and ninety-four, entitled, "An Act in addition to the Act for the punishment of certain crimes against the United States," continued in force, for a limited time, by the Act of the second of March One thousand seven hundred and ninety-seven, and perpetuated by the Act passed on the twenty-fourth of April One thousand eight hundred, and the Act passed on the fourteenth day of June One thousand seven hundred and ninety-seven, entitled, "An Act to prevent citizens of the United States from privateering against nations in amity with, or against the citizens of, the United States," and the Act passed the third day of March One thousand eight hundred and seventeen, entitled, "An Act more effectually to preserve the neutral relations of the United States," be, and the same are hereby severally repealed: Provided nevertheless, that persons having heretofore offended against any of the Acts aforesaid may be prosecuted, convicted, and punished as if the same were not repealed; and no forfeiture heretofore incurred by a violation of any of the Acts aforesaid shall be affected by such repeal.

Sect. 13. And be it further enacted, That nothing in the foregoing Act shall be construed to prevent the prosecution or punishment of treason, or any piracy defined by the laws of the United States.

APPENDIX D.

ENGLISH NAVAL PRIZE ACT.

27 & 28 Vict. Chap. 25.

An Act for regulating Naval Prize of War. [23rd *June*, 1864.]

Whereas it is expedient to enact permanently, with amendments, such provisions concerning Naval Prize, and matters connected therewith, as have heretofore been usually passed at the beginning of a war:

Be it therefore enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

Preliminary.

1. This Act may be cited as The Naval Prize Act, 1864. **Short title.**

2. In this Act— **Interpretation of terms.**

The term "the Lords of the Admiralty" means the Lord High Admiral of the United Kingdom, or the Commissioners for executing the office of Lord High Admiral:

The term "the High Court of Admiralty" means the High Court of Admiralty of *England:*

The term "any of Her Majesty's ships of war" includes any of Her Majesty's vessels of war, and any hired armed ship or vessel in Her Majesty's service:

The term "officers and crew" includes flag officers, commanders, and other officers, engineers, seamen, marines, soldiers, and others on board any of Her Majesty's ships of war:

The term "ship" includes vessel and boat, with the tackle, furniture, and apparel of the ship, vessel, or boat:

The term "ship papers" includes all books, passes, sea briefs, charter parties, bills of lading, cockets, letters, and other documents and writings delivered up or found on board a captured ship:

The term "goods" includes all such things as are by the course of admiralty and law of nations the subject of adjudication as prize (other than ships).

I.—Prize Courts.

3. The High Court of Admiralty, and every Court of Admiralty or of Vice-Admiralty, or other court exercising admiralty jurisdiction in Her Majesty's dominions, for the time being authorized to take cognizance of and judicially proceed in matters of prize, shall be a Prize Court within the meaning of this Act. **High Court of Admiralty and other courts to be Prize Courts for purposes of Act.**

Every such court, other than the High Court of Admiralty, is comprised in the term "Vice-Admiralty Prize Court," when hereafter used in this Act.

High Court of Admiralty.

4. The High Court of Admiralty shall have jurisdiction throughout Her Majesty's dominions as a Prize Court. **Jurisdiction of**

High Court of Admiralty.

The High Court of Admiralty as a prize court shall have power to enforce any order or decree of a Vice-Admiralty Prize Court, and any order or decree of the Judicial Committee of the Privy Council in a prize appeal.

Appeal; Judicial Committee.

Appeal to Queen in Council, in what cases.

5. An appeal shall lie to Her Majesty in Council from any order or decree of a prize court, as of right in case of a final decree, and in other cases with the leave of the Court making the order or decree.

Every appeal shall be made in such manner and form and subject to such regulations (including regulations as to fees, costs, charges, and expenses), as may for the time being be directed by order in council, and in the absence of any such order, or so far as any such order does not extend, then in such manner and form and subject to such regulations as are for the time being prescribed or in force respecting maritime causes of appeal.

Jurisdiction of Judicial Committee in prize appeals.

6. The Judicial Committee of the Privy Council shall have jurisdiction to hear and report on any such appeal, and may therein exercise all such powers as for the time being appertain to them in respect of appeals from any Court of Admiralty Jurisdiction, and all such powers as are under this Act vested in the High Court of Admiralty, and all such powers as were wont to be exercised by the Commissioners of Appeal in Prize Causes.

Custody of processes, papers, &c.

7. All processes and documents required for the purposes of any such Appeal shall be transmitted to and shall remain in custody of the Registrar of Her Majesty in Prize Appeals.

Limit of time for appeal.

8. In every such Appeal the usual inhibition shall be extracted from the Registry of Her Majesty in Prize Appeals within three months after the date of the order or decree appealed from if the Appeal be from the High Court of Admiralty, and within six months after that date if it be from a Vice-Admiralty Prize Court.

The Judicial Committee may, nevertheless, on sufficient cause shown, allow the inhibition to be extracted and the Appeal to be prosecuted after the expiration of the respective periods aforesaid.

Vice-Admiralty Prize Courts.

Enforcement of orders of High Court, &c.

9. Every Vice-Admiralty Prize Court shall enforce within its jurisdiction all orders and decrees of the Judicial Committee in Prize Appeals and of the High Court of Admiralty in Prize Causes.

Salaries of judges of Vice-Admiralty Prize Courts.

10. Her Majesty in Council may grant to the Judge of any Vice-Admiralty Prize Court a salary not exceeding five hundred pounds a year, payable out of money provided by Parliament, subject to such regulations as seem meet.

A Judge to whom a salary is so granted shall not be entitled to any further emolument, arising from fees or otherwise, in respect of prize business transacted in his Court.

An account of all such fees shall be kept by the Registrar of the Court, and the amount thereof shall be carried to and form part of the Consolidated Fund of the United Kingdom.

11. In accordance, as far as circumstances admit, with the principles and regulations laid down in the Superannuation Act, 1859, Her

is of

Majesty in Council may grant to the Judge of any Vice-Admiralty Prize Court an annual or other allowance, to take effect on the termination of his service, and to be payable out of money provided by Parliament.

judges, as in 22 & 23 Vict. c. 26.

12. The Registrar of every Vice-Admiralty Prize Court shall, on the First day of *January* and First day of *July* in every year, make out a return (in such form as the Lords of the Admiralty from time to time direct) of all cases adjudged in the Court since the last half-yearly return, and shall with all convenient speed send the same to the Registrar of the High Court of Admiralty, who shall keep the same in the Registry of that Court, and who shall, as soon as conveniently may be, send a copy of the returns of each half-year to the Lords of the Admiralty, who shall lay the same before both Houses of Parliament.

Returns from Vice-Admiralty Prize Courts.

General.

13. The Judicial Committee of the Privy Council, with the Judge of the High Court of Admiralty, may from time to time frame General Orders for regulating (subject to the provisions of this Act) the procedure and practice of Prize Courts, and the duties and conduct of the officers thereof and of the practitioners therein, and for regulating the fees to be taken by the officers of the Courts, and the costs, charges, and expenses to be allowed to the practitioners therein.

General orders for Prize Courts.

Any such General Orders shall have full effect, if and when approved by Her Majesty in Council, but not sooner or otherwise.

Every Order in Council made under this section shall be laid before both Houses of Parliament.

Every such Order in Council shall be kept exhibited in a conspicuous place in each Court to which it relates.

14. It shall not be lawful for any registrar, marshal, or other officer of any Prize Court, or for the Registrar of Her Majesty in Prize Appeals, directly or indirectly to act or be in any manner concerned as advocate, proctor, solicitor, or agent, or otherwise, in any Prize Cause or Appeal, on pain of dismissal or suspension from office, by order of the Court or of the Judicial Committee (as the case may require).

Prohibition of officer of Prize Court acting as Proctor, &c.

15. It shall not be lawful for any proctor or solicitor, or person practising as a proctor or solicitor, being employed by a party in a Prize Cause or Appeal, to be employed or concerned, by himself or his partner, or by any other person, directly or indirectly, by or on behalf of any adverse party in that Cause or Appeal, on pain of exclusion or suspension from practice in prize matters, by order of the Court or of the Judicial Committee (as the case may require).

Prohibition of proctors being concerned for adverse parties in a cause.

II.—Procedure in Prize Causes.

Proceedings by Captors.

16. Every ship taken as prize, and brought into port within the jurisdiction of a Prize Court, shall forthwith, and without bulk broken, be delivered up to the marshal of the Court.

Custody of prize ship.

If there is no such marshal, then the ship shall be in like manner delivered up to the principal officer of Customs at the port.

The ship shall remain in the custody of the marshal, or of such officer, subject to the orders of the Court.

Bringing in of ship papers.

17. The captors shall, with all practicable speed after the ship is brought into port, bring the ship papers into the registry of the Court.

The officer in command, or one of the chief officers of the capturing ship, or some other person who was present at the capture, and saw the ship papers delivered up or found on board, shall make oath that they are brought in as they were taken, without fraud, addition, subduction, or alteration, or else shall account on oath to the satisfaction of the Court for the absence or altered condition of the ship papers or any of them.

Where no ship papers are delivered up or found on board the captured ship, the officer in command, or one of the chief officers of the capturing ship, or some other person who was present at the capture, shall make oath to that effect.

Issue of monition.

18. As soon as the affidavit as to ship papers is filed, a monition shall issue, returnable within twenty days from the service thereof, citing all persons in general to show cause why the captured ship should not be condemned.

Examinations on standing interrogatories.

19. The captors shall, with all practicable speed after the captured ship is brought into port, bring three or four of the principal persons belonging to the captured ship before the Judge of the Court or some person authorized in this behalf, by whom they shall be examined on oath on the standing interrogatories.

The preparatory examinations on the standing interrogatories shall, if possible, be concluded within five days from the commencement thereof.

Adjudication by Court.

20. After the return of the monition, the Court shall, on production of the preparatory examinations and ship papers, proceed with all convenient speed either to condemn or to release the captured ship.

Further proof.

21. Where, on production of the preparatory examinations and ship papers, it appears to the Court doubtful whether the captured ship is good prize or not, the Court may direct further proof to be adduced either by affidavit or by examination of witnesses, with or without pleadings, or by production of further documents; and on such further proof being adduced the Court shall with all convenient speed proceed to adjudication.

Custody, &c., of ships of war.

22. The foregoing provisions, as far as they relate to the custody of the ship, and to examination on the standing interrogatories, shall not apply to ships of war taken as prize.

Claim.

Entry of claim; security for costs.

23. At any time before final decree made in the cause, any person claiming an interest in the ship may enter in the registry of the Court a claim, verified on oath.

Within five days after entering the claim, the claimant shall give security for costs in the sum of sixty pounds; but the Court shall have power to enlarge the time for giving security, or to direct security to be given in a larger sum, if the circumstances appear to require it.

Appraisement.

24. The Court may, if it thinks fit, at any time direct that the captured ship be appraised.

Every appraisement shall be made by competent persons sworn to make the same according to the best of their skill and knowledge.

Power to Court to direct appraisement.

Delivery on Bail.

25. After appraisement, the Court may, if it thinks fit, direct that the captured ship be delivered up to the claimant, on his giving security to the satisfaction of the Court to pay to the captors the appraised value thereof in case of condemnation.

Power to Court to direct delivery to claimant on bail.

Sale.

26. The Court may at any time, if it thinks fit, on account of the condition of the captured ship, or on the application of a claimant, order that the captured ship be appraised as aforesaid (if not already appraised), and be sold.

Power to Court to order sale.

27. On or after condemnation the Court may, if it thinks fit, order that the ship be appraised as aforesaid (if not already appraised), and be sold.

Sale on condemnation.

28. Every sale shall be made by or under the superintendence of the Marshal of the Court or of the officer having the custody of the captured ship.

How sales to be made.

29. The proceeds of any sale, made either before or after condemnation, and after condemnation the appraised value of the captured ship, in case she has been delivered up to a claimant on bail, shall be paid under an order of the Court either into the Bank of *England* to the credit of Her Majesty's Paymaster-General, or into the hands of an official accountant (belonging to the commissariat or some other department) appointed for this purpose by the commissioners of Her Majesty's Treasury or by the Lords of the Admiralty, subject in either case to such regulations as may from time to time be made, by Order in Council, as to the custody and disposal of money so paid.

Payment of proceeds to Paymaster-General or official accountant.

Small-Armed Ships.

30. The captors may include in one adjudication any number, not exceeding six, of armed ships not exceeding one hundred tons each, taken within three months next before institution of proceedings.

One adjudication as to several small ships.

Goods.

31. The foregoing provisions relating to ships shall extend and apply, *mutatis mutandis*, to goods taken as prize on board ship; and the Court may direct such goods to be unladen, inventoried and warehoused.

Application of foregoing provisions to prize goods.

Monition to Captors to proceed.

32. If the captors fail to institute or to prosecute with effect proceedings for adjudication, a monition shall, on the application of a claimant, issue against the captors, returnable within six days from the service thereof, citing them to appear and proceed to adjudication; and on the return thereof the Court shall either forthwith proceed to

Power to Court to call on captors to proceed to adjudication.

adjudication or direct further proof to be adduced as aforesaid, and then proceed to adjudication.

Claim on Appeal.

Person intervening on appeal to enter claim.

33. Where any person, not an original party in the cause, intervenes on appeal, he shall enter a claim, verified on oath, and shall give security for costs.

III.—Special Cases of Capture.

Land Expeditions.

Jurisdiction of Prize Court in case of capture in land expedition.

34. Where, in an expedition of any of Her Majesty's naval or naval and military forces against a fortress or possession on land, goods belonging to the State of the enemy or to a public trading company of the enemy exercising powers of government are taken in the fortress or possession, or a ship is taken in waters defended by or belonging to the fortress or possession, a Prize Court shall have jurisdiction as to the goods or ship so taken, and any goods taken on board the ship, as in case of prize.

Conjunct Capture with Ally.

Jurisdiction of Prize Court in case of expedition with ally.

35. Where any ship or goods is or are taken by any of Her Majesty's naval or naval and military forces while acting in conjunction with any forces of any of Her Majesty's allies, a Prize Court shall have jurisdiction as to the same as in case of prize, and shall have power, after condemnation, to apportion the due share of the proceeds to Her Majesty's ally, the proportionate amount and the disposition of which share shall be such as may from time to time be agreed between Her Majesty and Her Majesty's ally.

Joint Capture.

Restriction on petitions by asserted joint captors.

36. Before condemnation, a petition on behalf of asserted joint captors shall not (except by special leave of the Court) be admitted, unless and until they give security to the satisfaction of the Court to contribute to the actual captors a just proportion of any costs, charges, or expenses or damages that may be incurred by or awarded against the actual captors on account of the capture and detention of the prize.

After condemnation, such a petition shall not (except by special leave of the Court) be admitted unless and until the asserted joint captors pay to the actual captors a just proportion of the costs, charges, and expenses incurred by the actual captors in the case, and give such security as aforesaid, and show sufficient cause to the Court why their petition was not presented before condemnation.

Provided, that nothing in the present section shall extend to the asserted interest of a flag officer claiming to share by virtue of his flag.

Offences against Law of Prize.

In case of offence by

37. A Prize Court, on proof of any offence against the law of nations, or against this Act, or any Act relating to naval discipline, or

against any Order in Council or Royal Proclamation, or of any breach of Her Majesty's instructions relating to prize, or of any act of disobedience to the orders of the Lords of the Admiralty, or to the command of a superior officer, committed by the captors in relation to any ship or goods taken as prize, or in relation to any person on board any such ship, may, on condemnation, reserve the prize to Her Majesty's disposal, notwithstanding any grant that may have been made by Her Majesty in favour of captors.

captors, prize to be reserved for Crown.

Pre-emption.

38. Where a ship of a foreign nation passing the seas laden with naval or victualling stores intended to be carried to a port of any enemy of Her Majesty is taken and brought into a port of the United Kingdom, and the purchase for the service of Her Majesty of the stores on board the ship appears to the Lords of the Admiralty expedient without the condemnation thereof in a Prize Court, in that case the Lords of the Admiralty may purchase, on the account or for the service of Her Majesty, all or any of the stores on board the ship; and the Commissioners of Customs may permit the stores purchased to be entered and landed within any port.

Purchase by Admiralty for public service of stores on board foreign ships.

Capture by Ship other than a Ship of War.

39. Any ship or goods taken as prize by any of the officers and crew of a ship other than a ship of war of Her Majesty shall, on condemnation, belong to Her Majesty in her Office of Admiralty.

Prizes taken by ships other than ships of war to be droits of Admiralty.

IV.—Prize Salvage.

40. Where any ship or goods belonging to any of Her Majesty's subjects, after being taken as prize by the enemy, is or are retaken from the enemy by any of Her Majesty's ships of war, the same shall be restored by decree of a Prize Court to the owner, on his paying as prize salvage one-eighth part of the value of the prize to be decreed and ascertained by the Court, or such sum not exceeding one-eighth part of the estimated value of the prize as may be agreed on between the owner and the recaptors, and approved by order of the Court; provided, that where the re-capture is made under circumstances of special difficulty or danger, the Prize Court may, if it thinks fit, award to the re-captors as prize salvage a larger part than one-eighth part, but not exceeding in any case one-fourth part, of the value of the prize.

Salvage to re-captors of British ship or goods from enemy.

Provided also, that where a ship after being so taken is set forth or used by any of Her Majesty's enemies as a ship of war, this provision for restitution shall not apply, and the ship shall be adjudicated on as in other cases of prize.

41. Where a ship belonging to any of Her Majesty's subjects, after being taken as prize by the enemy, is retaken from the enemy by any of Her Majesty's ships of war, she may, with the consent of the re-captors, prosecute her voyage, and it shall not be necessary for the re-captors to proceed to adjudication till her return to a port of the United Kingdom.

Permission to re-captured ship to proceed on voyage.

The master or owner, or his agent, may, with the consent of the

re-captors, unload and dispose of the goods on board the ship before adjudication.

In case the ship does not, within six months, return to a port of the United Kingdom, the re-captors may nevertheless institute proceedings against the ship or goods in the High Court of Admiralty, and the Court may thereupon award prize salvage as aforesaid to the re-captors, and may enforce payment thereof, either by warrant of arrest against the ship or goods, or by monition and attachment against the owner.

V.—Prize Bounty.

Prize bounty to officers and crew present at engagement with an enemy.

42. If, in relation to any war, Her Majesty is pleased to declare, by proclamation or Order in Council, her intention to grant prize bounty to the officers and crews of her ships of war, then such of the officers and crew of any of Her Majesty's ships of war as are actually present at the taking or destroying of any armed ship of any of Her Majesty's enemies shall be entitled to have distributed among them as prize bounty a sum calculated at the rate of five pounds for each person on board the enemy's ship at the beginning of the engagement.

Ascertainment of amount of prize bounty by decree of Prize Court.

43. The number of the persons so on board the enemy's ship shall be proved in a Prize Court, either by the examinations on oath of the survivors of them, or of any three or more of the survivors, or if there is no survivor by the papers of the enemy's ship, or by the examinations on oath of three or more of the officers and crew of Her Majesty's ship, or by such other evidence as may seem to the Court sufficient in the circumstances.

The Court shall make a decree declaring the title of the officers and crew of Her Majesty's ship to the prize bounty, and stating the amount thereof.

The decree shall be subject to appeal as other decrees of the Court.

Payment of prize bounty awarded.

44. On production of an official copy of the decree the commissioners of Her Majesty's Treasury shall, out of money provided by Parliament, pay the amount of prize bounty decreed, in such manner as any Order in Council may from time to time direct.

VI.—Miscellaneous Provisions.

Ransom.

Power for regulating ransom by order in council.

45. Her Majesty in Council may from time to time, in relation to any war, make such orders as may seem expedient, according to circumstances, for prohibiting or allowing, wholly or in certain cases, or subject to any conditions or regulations or otherwise, as may from time to time seem meet, the ransoming or the entering into any contract or agreement for the ransoming of any ship or goods belonging to any of Her Majesty's subjects, and taken as prize by any of Her Majesty's enemies.

Any contract or agreement entered into, and any bill, bond, or other security given for ransom of any ship or goods, shall be under the exclusive jurisdiction of the High Court of Admiralty as a Prize Court (subject to appeal to the Judicial Committee of the Privy Council), and if entered into or given in contravention of any such Order in

Council shall be deemed to have been entered into or given for an illegal consideration.

If any person ransoms or enters into any contract or agreement for ransoming any ship or goods, in contravention of any such Order in Council, he shall for every such offence be liable to be proceeded against in the High Court of Admiralty at the suit of Her Majesty in her Office of Admiralty, and on conviction to be fined, in the discretion of the Court, any sum not exceeding five hundred pounds.

Convoy.

Punishment of masters of merchant vessels under convoy disobeying orders or deserting convoy.

46. If the master or other person having the command of any ship of any of Her Majesty's subjects, under the convoy of any of Her Majesty's ships of war, wilfully disobeys any lawful signal, instruction, or command of the commander of the convoy, or without leave deserts the convoy, he shall be liable to be proceeded against in the High Court of Admiralty at the suit of Her Majesty in her Office of Admiralty, and upon conviction to be fined, in the discretion of the Court, any sum not exceeding five hundred pounds, and to suffer imprisonment for such time, not exceeding one year, as the Court may adjudge.

Customs Duties and Regulations.

Prize ships and goods liable to duties and forfeiture.

47. All ships and goods taken as prize and brought into a port of the United Kingdom shall be liable to and be charged with the same rates and charges and duties of customs as under any Act relating to the Customs may be chargeable on other ships and goods of the like description; and

All goods brought in as prize which would on the voluntary importation thereof be liable to forfeiture or subject to any restriction under the laws relating to the Customs, shall be deemed to be so liable and subject, unless the Commissioners of Customs see fit to authorize the sale or delivery thereof for home use or exportation, unconditionally or subject to such conditions and regulations as they may direct.

Regulations of customs to be observed as to prize ships and goods.

48. Where any ship or goods taken as prize is or are brought into a port of the United Kingdom, the master or other person in charge or command of the ship which has been taken or in which the goods are brought shall, on arrival at such port, bring to at the proper place of discharge, and shall, when required by any officer of Customs, deliver an account in writing under his hand concerning such ship and goods, giving such particulars relating thereto as may be in his power, and shall truly answer all questions concerning such ship or goods asked by any such officer, and in default shall forfeit a sum not exceeding one hundred pounds, such forfeiture to be enforced as forfeitures for offences against the laws relating to the Customs are enforced, and every such ship shall be liable to such searches as other ships are liable to, and the officers of the Customs may freely go on board such ship and bring to the Queen's warehouse any goods on board the same, subject nevertheless to such regulations in respect of ships of war belonging to Her Majesty as shall from time to time be issued by the Commissioners of Her Majesty's Treasury.

Power for Treasury to remit Customs duties in certain cases.

49. Goods taken as prize may be sold either for home consumption or for exportation; and if in the former case the proceeds thereof, after payment of duties of Customs, are insufficient to satisfy the just and reasonable claims thereon, the Commissioners of Her Majesty's Treasury may remit the whole or such part of the said duties as they see fit.

Perjury.

Punishment of persons guilty of perjury.

50. If any person wilfully and corruptly swears, declares, or affirms falsely in any prize cause or appeal, or in any proceeding under this Act, or in respect of any matter required by this Act to be verified on oath, or suborns any other person to do so, he shall be deemed guilty of perjury, or of subornation of perjury (as the case may be), and shall be liable to be punished accordingly.

Limitation of Actions, &c.

Actions against persons executing Act not to be brought without notice, &c.

51. Any action or proceeding shall not lie in any part of Her Majesty's dominions against any person acting under the authority or in the execution or intended execution or in pursuance of this Act for any alleged irregularity or trespass, or other act or thing done or omitted by him under this Act, unless notice in writing (specifying the cause of the action or proceeding) is given by the intending plaintiff or prosecutor to the intended defendant one month at least before the commencement of the action or proceeding, nor unless the action or proceeding is commenced within six months next after the act or thing complained of is done or omitted, or, in case of a continuation of damage, within six months next after the doing of such damage has ceased.

In any such action the defendant may plead generally that the act or thing complained of was done or omitted by him when acting under the authority or in the execution or intended execution or in pursuance of this Act, and may give all special matter in evidence; and the plaintiff shall not succeed if tender of sufficient amends is made by the defendant before the commencement of the action; and in case no tender has been made, the defendant may, by leave of the Court in which the action is brought, at any time pay into Court such sum of money as he thinks fit, whereupon such proceeding and order shall be had and made in and by the Court as may be had and made on the payment of money into Court in an ordinary action; and if the plaintiff does not succeed in the action, the defendant shall receive such full and reasonable indemnity as to all costs, charges, and expenses incurred in and about the action as may be taxed and allowed by the proper officer, subject to review; and though a verdict is given for the plaintiff in the action he shall not have costs against the defendant, unless the judge before whom the trial is had certifies his approval of the action.

Any such action or proceeding against any person in Her Majesty's Naval service, or in the employment of the Lords of the Admiralty, shall not be brought or instituted elsewhere than in the United Kingdom.

Petitions of Right.

52. A petition of right, under The Petitions of Right Act, 1860, may, if the suppliant thinks fit, be intituled in the High Court of Admiralty, in case the subject matter of the petition or any material part thereof arises out of the exercise of any belligerent right on behalf of the Crown, or would be cognizable in a Prize Court within Her Majesty's dominions if the same were a matter in dispute between private persons.

Jurisdiction of High Court of Admiralty on petitions of right in certain cases, as in 23 & 24 Vict. c. 34.

Any petition of right under the last-mentioned Act, whether intituled in the High Court of Admiralty or not, may be prosecuted in that Court, if the Lord Chancellor thinks fit so to direct.

The provisions of this Act relative to appeal, and to the framing and approval of general orders for regulating the procedure and practice of the High Court of Admiralty, shall extend to the case of any such petition of right intituled or directed to be prosecuted in that Court; and, subject thereto, all the provisions of The Petitions of Right Act, 1860, shall apply, *mutatis mutandis*, in the case of any such petition of right; and for the purposes of the present section, the terms "Court" and "Judge" in that Act shall respectively be understood to include and to mean the High Court of Admiralty and the judge thereof, and other terms shall have the respective meanings given to them in that Act.

Orders in Council.

53. Her Majesty in Council may from time to time make such Orders in Council as seem meet for the better execution of this Act.

Power to make orders in council.

54. Every Order in Council under this Act shall be published in the *London Gazette*, and shall be laid before both Houses of Parliament within thirty days after the making thereof, if Parliament is then sitting, and, if not, then within thirty days after the next meeting of Parliament.

Order in council to be gazetted, &c.

Savings.

55. Nothing in this Act shall—

Not to affect rights of Crown; effect of treaties, &c.

(1.) give to the officers and crew of any of Her Majesty's ships of war any right or claim in or to any ship or goods taken as prize or the proceeds thereof, it being the intent of this Act that such officers and crews shall continue to take only such interest (if any) in the proceeds of prizes as may be from time to time granted to them by the Crown; or

(2.) affect the operation of any existing treaty or convention with any foreign power; or

(3.) take away or abridge the power of the Crown to enter into any treaty or convention with any foreign power containing any stipulation that may seem meet concerning any matter to which this Act relates; or

(4.) take away, abridge, or control, further or otherwise than as expressly provided by this Act, any right, power, or prerogative of Her Majesty the Queen in right of her Crown, or in right of her Office of Admiralty, or any right or power of the Lord High Admiral of the United King-

dom, or of the commissioners for executing the office of Lord High Admiral; or

(5.) take away, abridge, or control, further or otherwise than as expressly provided by this Act, the jurisdiction or authority of a Prize Court to take cognizance of and judicially proceed upon any capture, seizure, prize, or reprisal of any ship or goods, and to hear and determine the same, and, according to the course of Admiralty and the law of nations, to adjudge and condemn any ship or goods, or any other jurisdiction or authority of or exerciseable by a Prize Court.

Commencement.

Commencement of Act.

56. This Act shall commence on the commencement of the Naval Agency and Distribution Act, 1864.

APPENDIX E.

THE TREATY OF WASHINGTON, 1871.

Concluded May 8, 1871; *Ratifications Exchanged June* 17, 1871; *Proclaimed July* 4, 1871.

THE United States of America and Her Britannic Majesty, being desirous to provide for an amicable settlement of all causes of difference between the two countries, have for that purpose appointed their respective Plenipotentiaries, that is to say: the President of the United States has appointed, on the part of the United States, as Commissioners in a Joint High Commission and Plenipotentiaries, Hamilton Fish, Secretary of State; Robert Cumming Schenck, Envoy Extraordinary and Minister Plenipotentiary to Great Britain; Samuel Nelson, an Associate Justice of the Supreme Court of the United States; Ebenezer Rockwood Hoar, of Massachusetts; and George Henry Williams, of Oregon; and Her Britannic Majesty, on her part, has appointed as Her High Commissioners and Plenipotentiaries, the Right Honourable George Frederick Samuel, Earl de Grey and Earl of Ripon, Viscount Goderich, Baron Grantham, a Baronet, a Peer of the United Kingdom, Lord President of Her Majesty's most Honourable Privy Council, Knight of the Most Noble Order of the Garter, &c., &c.; the Right Honourable Sir Stafford Henry Northcote, Baronet, one of Her Majesty's Most Honourable Privy Council, a Member of Parliament, a Companion of the Most Honourable Order of the Bath, &c., &c.; Sir Edward Thornton, Knight Commander of the Most Honourable Order of the Bath, Her Majesty's Envoy Extraordinary and Minister Plenipotentiary to the United States of America; Sir John Alexander Macdonald, Knight Commander of the Most Honourable Order of the Bath, a member of Her Majesty's Privy Council for Canada, and

Minister of Justice and Attorney-General of her Majesty's Dominion of Canada; and Mountague Bernard, Esquire, Chichele Professor of International Law in the University of Oxford.

And the said Plenipotentiaries, after having exchanged their full powers, which were found to be in due and proper form, have agreed to and concluded the following articles:

Article I.

Alabama claims to be referred to arbitration.

Whereas differences have arisen between the government of the United States and the government of Her Britannic Majesty; and still exist, growing out of the acts committed by the several vessels which have given rise to the claims generically known as the "*Alabama Claims*":

And whereas Her Britannic Majesty has authorized Her High Commissioners and Plenipotentiaries to express, in a friendly spirit, the regret felt by Her Majesty's government for the escape, under whatever circumstances, of *The Alabama* and other vessels from British ports, and for the depredations committed by those vessels:

Arbitrators, how to be named.

Now, in order to remove and adjust all complaints and claims on the part of the United States, and to provide for the speedy settlement of such claims, which are not admitted by Her Britannic Majesty's government, the High Contracting Parties agree that all the said claims, growing out of acts committed by the aforesaid vessels and generically known as the "*Alabama Claims*," shall be referred to a Tribunal of Arbitration to be composed of five Arbitrators, to be appointed in the following manner, that is to say: One shall be named by the President of the United States; one shall be named by Her Britannic Majesty; His Majesty the King of Italy shall be requested to name one; the President of the Swiss Confederation shall be requested to name one; and His Majesty the Emperor of Brazil shall be requested to name one.

Vacancies, how filled.

In case of the death, absence, or incapacity to serve of any or either of the said Arbitrators, or, in the event of either of the said Arbitrators omitting or declining or ceasing to act as such, the President of the United States, or Her Britannic Majesty, or His Majesty the King of Italy, or the President of the Swiss Confederation, or His Majesty the Emperor of Brazil, as the case may be, may forthwith name another person to act as Arbitrator in the place and stead of the Arbitrator originally named by such Head of a State.

And in the event of the refusal or omission for two months after receipt of the request from either of the High Contracting Parties of His Majesty the King of Italy, or the President of the Swiss Confederation, or His Majesty the Emperor of Brazil, to name an Arbitrator either to fill the original appointment or in the place of one who may have died, be absent, or incapacitated, or who may omit, decline, or from any cause cease to act as such Arbitrator, His Majesty the King of Sweden and Norway shall be requested to name one or more persons, as the case may be, to act as such Arbitrator or Arbitrators.

Article II.

Arbitrators to

The Arbitrators shall meet at Geneva, in Switzerland, at the earliest convenient day after they shall have been named, and shall proceed

meet, when, and where; their powers; a majority to decide.

impartially and carefully to examine and decide all questions that shall be laid before them on the part of the governments of the United States and Her Britannic Majesty respectively. All questions considered by the tribunal, including the final award, shall be decided by a majority of all the Arbitrators.

Agents of each party.

Each of the High Contracting Parties shall also name one person to attend the tribunal as its agent to represent it generally in all matters connected with the arbitration.

Article III.

Case of each party, &c., when to be given to arbitrators.

The written or printed case of each of the two parties, accompanied by the documents, the official correspondence, and other evidence on which each relies, shall be delivered in duplicate to each of the Arbitrators and to the agent of the other party as soon as may be after the organization of the tribunal, but within a period not exceeding six months from the date of the exchange of the ratifications of this treaty.

Article IV.

Counter case, &c.

Within four months after the delivery on both sides of the written or printed case, either party may, in like manner, deliver in duplicate to each of the said Arbitrators, and to the agent of the other party, a counter-case, and additional documents, correspondence, and evidence, in reply to the case, documents, correspondence, and evidence so presented by the other party.

Time may be extended.

The Arbitrators may, however, extend the time for delivering such counter-case, documents, correspondence, and evidence, when, in their judgment, it becomes necessary, in consequence of the distance of the place from which the evidence to be presented is to be procured.

Documents and papers to be produced.

If in the case submitted to the Arbitrators either party shall have specified or alluded to any report or document in its own exclusive possession without annexing a copy, such party shall be bound, if the other party thinks proper to apply for it, to furnish that party with a copy thereof; and either party may call upon the other, through the Arbitrators, to produce the originals or certified copies of any papers adduced as evidence, giving in each instance such reasonable notice as the Arbitrators may require.

Article V.

Arguments and briefs.

It shall be the duty of the agent of each party, within two months after the expiration of the time limited for the delivery of the counter-case on both sides, to deliver in duplicate to each of the said Arbitrators and to the agent of the other party a written or printed argument showing the points and referring to the evidence upon which his government relies: and the Arbitrators may, if they desire further elucidation with regard to any point, require a written or printed statement or argument, or oral argument by counsel upon it; but in such case the other party shall be entitled to reply either orally or in writing, as the case may be.

Article VI.

In deciding the matters submitted to the Arbitrators, they shall be governed by the following three rules, which are agreed upon by the High Contracting Parties as rules to be taken as applicable to the case, and by such principles of international law not inconsistent therewith as the Arbitrators shall determine to have been applicable to the case.

Rules to govern the arbitrators in their decision.

RULES.

A neutral government is bound—

First, to use due diligence to prevent the fitting out, arming, or equipping, within its jurisdiction, of any vessel which it has reasonable ground to believe is intended to cruise or to carry on war against a Power with which it is at peace; and also to use like diligence to prevent the departure from its jurisdiction of any vessel intended to cruise or carry on war as above, such vessel having being specially adapted, in whole or in part within such jurisdiction, to warlike use.

Obligation of neutral government as to fitting out vessels in its waters;

Secondly, not to permit or suffer either belligerent to make use of its ports or waters as the base of naval operations against the other, or for the purpose of the renewal or augmentation of military supplies or arms, or the recruitment of men.

as to the use of its ports;

Thirdly, to exercise due diligence in its own ports and waters, and, as to all persons within its jurisdiction, to prevent any violation of the foregoing obligations and duties.

to prevent violation of its obligations.

Her Britannic Majesty has commanded Her High Commissioners and Plenipotentiaries to declare that Her Majesty's government cannot assent to the foregoing rules as a statement of principles of international law which were in force at the time when the claims mentioned in Article I. arose; but that Her Majesty's government, in order to evince its desire of strengthening the friendly relations between the two countries and of making satisfactory provision for the future, agrees that, in deciding the questions between the two countries arising out of those claims, the Arbitrators should assume that Her Majesty's Government had undertaken to act upon the principles set forth in these rules.

These rules not admitted to have been in force when the claims arose.

And the High Contracting Parties agree to observe these rules as between themselves in future, and to bring them to the knowledge of other maritime powers, and to invite them to accede to them.

Rules to govern future cases.

Article VII.

The decision of the tribunal shall, if possible, be made within three months from the close of the argument on both sides.

Decision to be made, when, and in what form;

It shall be made in writing and dated, and shall be signed by the Arbitrators who may assent to it.

The said tribunal shall first determine as to each vessel separately whether Great Britain has, by any act or omission, failed to fulfil any

of the duties set forth in the foregoing three rules, or recognized by the principles of international law not inconsistent with such rules, and shall certify such fact as to each of the said vessels. In case the tribunal find that Great Britain has failed to fulfil any duty or duties as aforesaid, it may, if it think proper, proceed to award a sum in gross to be paid by Great Britain to the United States for all the claims referred to it; and in such case the gross sum so awarded shall be paid in coin by the government of Great Britain to the government of the United States, at Washington, within twelve months after the date of the award.

If Great Britain is found in fault, a gross sum may be awarded.

The award shall be in duplicate, one copy whereof shall be delivered to the agent of the United States for his government, and the other copy shall be delivered to the agent of Great Britain for his government.

Award to be in duplicate.

Article VIII.

Each government shall pay its own agent, and provide for the proper remuneration of the counsel employed by it and of the Arbitrator appointed by it, and for the expense of preparing and submitting its case to the tribunal. All other expenses connected with the arbitration shall be defrayed by the two governments in equal moieties.

Expenses of the arbitration, how to be defrayed.

Article IX.

The Arbitrators shall keep an accurate record of their proceedings, and may appoint and employ the necessary officers to assist them.

Arbitrators to keep a record.

Article X.

In case the tribunal finds that Great Britain has failed to fulfil any duty or duties as aforesaid, and does not award a sum in gross, the High Contracting Parties agree that a Board of Assessors shall be appointed to ascertain and determine what claims are valid, and what amount or amounts shall be paid by Great Britain to the United States on account of the liability arising from such failure, as to each vessel according to the extent of such liability as decided by the Arbitrators.

If Great Britain is found in fault, and a gross sum is not awarded, board of assessors to be appointed to determine claims.

The Board of Assessors shall be constituted as follows: One member thereof shall be named by the President of the United States, one member thereof shall be named by Her Britannic Majesty, and one member thereof shall be named by the representative at Washington of His Majesty the King of Italy; and in case of a vacancy happening from any cause, it shall be filled in the same manner in which the original appointment was made.

As soon as possible after such nominations the Board of Assessors shall be organized in Washington, with power to hold their sittings there, or in New York, or in Boston. The members thereof shall severally subscribe a solemn declaration that they will impartially and carefully examine and decide, to the best of their judgment, and ac-

Board, when to meet. Members to subscribe a declaration.

cording to justice and equity, all matters submitted to them, and shall forthwith proceed, under such rules and regulations as they may prescribe, to the investigation of the claims which shall be presented to them by the government of the United States, and shall examine and decide upon them in such order and manner as they may think proper, but upon such evidence or information only as shall be furnished by or on behalf of the governments of the United States and of Great Britain respectively. They shall be bound to hear on each separate claim, if required, one person on behalf of each government, as counsel or agent. A majority of the Assessors in each case shall be sufficient for a decision.

Decision, when and how given.

The decision of the Assessors shall be given upon each claim in writing, and shall be signed by them respectively and dated.

Claims, when to be presented.

Every claim shall be presented to the Assessors within six months from the day of their first meeting; but they may, for good cause shown, extend the time for the presentation of any claim to a further period not exceeding three months.

Report of assessors;

The Assessors shall report to each government at or before the expiration of one year from the date of their first meeting the amount of claims decided by them up to the date of such report; if further claims then remain undecided, they shall make a further report at or before the expiration of two years from the date of such first meeting; and in case any claims remain undetermined at that time, they shall make a final report within a further period of six months.

how to be made and to whom delivered.

The report or reports shall be made in duplicate, and one copy thereof shall be delivered to the Secretary of State of the United States, and one copy thereof to the representative of Her Britannic Majesty at Washington.

Awards, when and where to be paid.

All sums of money which may be awarded under this article shall be payable at Washington, in coin, within twelve months after the delivery of each report.

Clerks.

The Board of Assessors may employ such clerks as they shall think necessary.

Expenses.

The expenses of the Board of Assessors shall be borne equally by the two governments, and paid from time to time, as may be found expedient on the production of accounts certified by the Board. The remuneration of the Assessors shall also be paid by the two governments in equal moieties in a similar manner.

Article XI.

Decisions of the arbitrators and assessors to be final.

Claims not presented to be deemed finally settled.

The High Contracting Parties engage to consider the result of the proceedings of the Tribunal of Arbitration and of the Board of Assessors, should such Board be appointed, as a full, perfect, and final settlement of all the claims hereinbefore referred to; and further engage that every such claim, whether the same may or may not have been presented to the notice of, made, preferred, or laid before the Tribunal or Board, shall, from and after the conclusion of the proceedings of the Tribunal or Board, be considered and treated as finally settled, barred, and thenceforth inadmissible.

Article XII.

Certain claims (other than the *Alabama* claims) against either government to be referred to three commissioners.

The High Contracting Parties agree that all claims on the part of corporations, companies, or private individuals, citizens of the United States, upon the government of Her Britannic Majesty, arising out of acts committed against the persons or property of citizens of the United States during the period between the 13th of April, 1861, and the 9th of April, 1865, inclusive, not being claims growing out of the acts of the vessels referred to in Article I. of this treaty, and all claims, with the like exception, on the part of corporations, companies, or private individuals, subjects of Her Britannic Majesty, upon the government of the United States, arising out of acts committed against the persons or property of subjects of Her Britannic Majesty during the same period, which may have been presented to either government for its interposition with the other, and which yet remain unsettled, as well as any other such claims which may be presented within the time specified in Article XIV. of this treaty, shall be referred to three Commissioners, to be appointed in the following manner, that is to say: One Commissioner shall be named by the President of the United States, one by Her Britannic Majesty, and a third by the President of the United States and Her Britannic Majesty conjointly; and in case the third Commissioner shall not have been so named within a period of three months from the date of the exchange of the ratifications of this treaty, then the third Commissioner shall be named by the representative at Washington of His Majesty the King of Spain. In case of the death, absence, or incapacity of any Commissioner, or in the event of any Commissioner omitting or ceasing to act, the vacancy shall be filled in the manner hereinbefore provided for making the original appointment; the period of three months in case of such substitution being calculated from the date of the happening of the vacancy.

Their powers and duties.

The Commissioners so named shall meet at Washington at the earliest convenient period after they have been respectively named; and shall, before proceeding to any business, make and subscribe a solemn declaration that they will impartially and carefully examine and decide, to the best of their judgment, and according to justice and equity, all such claims as shall be laid before them on the part of the governments of the United States and of Her Britannic Majesty, respectively; and such declaration shall be entered on the record of their proceedings.

Article XIII.

Claims to be investigated.

The Commissioners shall then forthwith proceed to the investigation of the claims which shall be presented to them. They shall investigate and decide such claims in such order and such manner as they may think proper, but upon such evidence or information only as shall be furnished by or on behalf of the respective governments. They shall be bound to receive and consider all written documents or statements which may be presented to them by or on behalf of the respective governments in support of, or in answer to, any claim, and to hear, if required, one person on each side on behalf of each government, as

counsel or agent for such government, on each and every separate claim. A majority of the Commissioners shall be sufficient for an award in each case. The award shall be given upon each claim in writing, and shall be signed by the Commissioners assenting to it. It shall be competent for each government to name one person to attend the Commissioners as its agent, to present and support claims on its behalf, and to answer claims made upon it, and to represent it generally in all matters connected with the investigation and decision thereof.

A majority to decide.

The High Contracting Parties hereby engage to consider the decision of the Commissioners as absolutely final and conclusive upon each claim decided upon by them, and to give full effect to such decisions without any objection, evasion or delay whatsoever.

Decisions to be final.

Article XIV.

Every claim shall be presented to the Commissioners within six months from the day of their first meeting, unless in any case where reasons for delay shall be established to the satisfaction of the Commissioners, and then, and in any such case, the period for presenting the claim may be extended by them to any time not exceeding three months longer.

Claims, when to be presented to the commissioners.

The Commissioners shall be bound to examine and decide upon every claim within two years from the day of their first meeting. It shall be competent for the Commissioners to decide in each case whether any claim has or has not been duly made, preferred, and laid before them, either wholly or to any and what extent, according to the true intent and meaning of this treaty.

When to be decided.

Article XV.

All sums of money which may be awarded by the Commissioners on account of any claim shall be paid by the one government to the other, as the case may be, within twelve months after the date of the final award, without interest, and without any deduction save as specified in Article XVI. of this treaty.

Awards, when to be paid.

Article XVI.

The Commissioners shall keep an accurate record and correct minutes or notes of all their proceedings, with the dates thereof, and may appoint and employ a secretary, and any other necessary officer or officers, to assist them in the transaction of the business which may come before them.

Records.

Secretary.

Each government shall pay its own Commissioner and agent or counsel. All other expenses shall be defrayed by the two governments in equal moieties.

Expenses.

The whole expenses of the Commission, including contingent expenses, shall be defrayed by a rateable deduction on the amount of the sums awarded by the Commissioners, provided always that such

Chargeable on awards.

deduction shall not exceed the rate of five per cent. on the sums so awarded.

Article XVII.

Decision of commissioners to be final upon all claims that might have been presented.

The High Contracting Parties engage to consider the result of the proceedings of this Commission as a full, perfect, and final settlement of all such claims as are mentioned in Article XII. of this treaty upon either government; and further engage that every such claim, whether or not the same may have been presented to the notice of, made, preferred, or laid before the said Commission, shall, from and after the conclusion of the proceedings of the said Commission, be considered and treated as finally settled, barred, and thenceforth inadmissible.

Article XVIII.

Rights of the inhabitants of the United States in certain sea fisheries in common with British subjects.

It is agreed by the High Contracting Parties, that in addition to the liberty secured to the United States fishermen by the Convention between the United States and Great Britain, signed at London on the 20th day of October, 1818, of taking, curing, and drying fish on certain coasts of the British North American Colonies therein defined, the inhabitants of the United States shall have, in common with the subjects of Her Britannic Majesty, the liberty, for the term of years mentioned in Article XXXIII. of this treaty, to take fish of every kind, except shell-fish, on the sea-coasts and shores, and in the bays, harbours, and creeks, of the Provinces of Quebec, Nova Scotia, and New Brunswick, and the Colony of Prince Edward's Island, and of the several islands thereunto adjacent, without being restricted to any distance from the shore, with permission to land upon the said coasts and shores and islands, and also upon the Magdalen Islands, for the purpose of drying their nets and curing their fish: provided that, in so doing, they do not interfere with the rights of private property, or with British fishermen in the peaceable use of any part of the said coasts in their occupancy for the same purpose.

Salmon and shad fisheries reserved for British fishermen.

It is understood that the above-mentioned liberty applies solely to the sea fishery, and that the salmon and shad fisheries, and all other fisheries in rivers and the mouths of rivers, are hereby reserved exclusively for British fishermen.

Article XIX.

Rights of British subjects in certain United States sea fisheries.

It is agreed by the High Contracting Parties that British subjects shall have, in common with the citizens of the United States, the liberty, for the term of years mentioned in Article XXXIII. of this treaty, to take fish of every kind, except shell-fish, on the eastern sea-coasts and shores of the United States north of the thirty-ninth parallel of north latitude, and on the shores of the several islands thereunto adjacent, and in the bays, harbours, and creeks of the said sea-coasts and shores of the United States and of the said islands, without being restricted to any distance from the shore, with permission to land upon the said coasts of the United States and of the islands aforesaid, for the purpose of drying their nets and curing their fish: provided that, in

so doing, they do not interfere with the rights of private property, or with the fishermen of the United States in the peaceable use of any part of the said coasts in their occupancy for the same purpose.

It is understood that the above-mentioned liberty applies solely to the sea fishery, and that salmon and shad fisheries, and all other fisheries in rivers and mouths of rivers, are hereby reserved exclusively for fishermen of the United States.

Salmon and shad fisheries reserved.

Article XX.

It is agreed that the places designated by the Commissioners appointed under the First Article of the treaty between the United States and Great Britain, concluded at Washington on the 5th of June, 1854, upon the coasts of Her Britannic Majesty's dominions and the United States, as places reserved from the common right of fishing under that treaty, shall be regarded as in like manner reserved from the common right of fishing under the preceding Articles. In case any question should arise between the governments of the United States and of Her Britannic Majesty as to the common right of fishing in places not thus designated as reserved, it is agreed that a Commission shall be appointed to designate such places, and shall be constituted in the same manner, and have the same powers, duties, and authority as the Commission appointed under the said First Article of the treaty of the 5th of June, 1854.

Certain places reserved from the common right of fishing.

Article XXI.

It is agreed that, for the term of years mentioned in Article XXXIII. of this treaty, fish-oil and fish of all kinds (except fish of the inland lakes, and of the rivers falling into them, and except fish preserved in oil), being the produce of the fisheries of the United States or of the Dominion of Canada, or of Prince Edward's Island, shall be admitted into each country, respectively, free of duty.

Certain fish-oil and fish to be free of duty.

Article XXII.

Inasmuch as it is asserted by the government of Her Britannic Majesty that the privileges accorded to the citizens of the United States under Article XVIII. of this treaty are of greater value than those accorded by Articles XIX. and XXI. of this treaty to the subjects of Her Britannic Majesty, and this assertion is not admitted by the government of the United States, it is further agreed that Commissioners shall be appointed to determine, having regard to the privileges accorded by the United States to the subjects of Her Britannic Majesty, as stated in Articles XIX. and XXI. of this treaty, the amount of any compensation which, in their opinion, ought to be paid by the government of the United States to the government of Her Britannic Majesty in return for the privileges accorded to the citizens of the United States under Article XVIII. of this treaty; and that any sum of money which the said Commissioners may so award shall be paid by the United States government, in a gross sum, within twelve months after such award shall have been given.

Commissioners to determine the compensation, if any, to be paid by United States for privileges granted by Art. XVIII.

Article XXIII.

Commissioners, how to be appointed.

The Commissioners referred to in the preceding Article shall be appointed in the following manner, that is to say: One Commissioner shall be named by the President of the United States, one by Her Britannic Majesty, and a third by the President of the United States and Her Britannic Majesty conjointly; and in case the third Commissioner shall not have been so named within a period of three months from the date when this Article shall take effect, then the third Commissioner shall be named by the representative at London of His Majesty the Emperor of Austria and King of Hungary. In case of the death, absence, or incapacity of any Commissioner, or in the event of any Commissioner omitting or ceasing to act, the vacancy shall be filled in the manner hereinbefore provided for making the original appointment, the period of three months in case of such substitution being calculated from the date of the happening of the vacancy.

When and where to meet; their powers and duties.

The Commissioners so named shall meet in the City of Halifax, in the Province of Nova Scotia, at the earliest convenient period after they have been respectively named, and shall, before proceeding to any business, make and subscribe a solemn declaration that they will impartially and carefully examine and decide the matters referred to them to the best of their judgment, and according to justice and equity; and such declaration shall be entered on the record of their proceedings.

Agent for each government.

Each of the High Contracting Parties shall also name one person to attend the Commission as its agent, to represent it generally in all matters connected with the Commission.

Article XXIV.

Proceedings before these commissioners, how to be conducted.

The proceedings shall be conducted in such order as the Commissioners appointed under Articles XXII. and XXIII. of this Treaty shall determine. They shall be bound to receive such oral or written testimony as either government may present. If either party shall offer oral testimony, the other party shall have the right of cross-examination, under such rules as the Commissioners shall prescribe.

Documents and papers.

If in the case submitted to the Commissioners either party shall have specified or alluded to any report or document in its own exclusive possession, without annexing a copy, such party shall be bound, if the other party thinks proper to apply for it, to furnish that party with a copy thereof; and either party may call upon the other, through the Commissioners, to produce the originals or certified copies of any papers adduced as evidence, giving in each instance such reasonable notice as the Commissioners may require.

Cases to be closed in six months.

Awards.

The case on either side shall be closed within a period of six months from the date of the organisation of the Commission, and the Commissioners shall be requested to give their award as soon as possible thereafter. The aforesaid period of six months may be extended for three months in case of a vacancy occurring among the Commissioners under the circumstances contemplated in Article XXIII. of this treaty.

Article XXV.

The Commissioners shall keep an accurate record and correct minutes or notes of all their proceedings, with the dates thereof, and may appoint and employ a secretary, and any other necessary officer or officers, to assist them in the transaction of the business which may come before them. Records.

Each of the High Contracting Parties shall pay its own Commissioner and agent or counsel; all other expenses shall be defrayed by the two governments in equal moieties. Expenses.

Article XXVI.

The navigation of the River St. Lawrence, ascending and descending, from the forty-fifth parallel of north latitude, where it ceases to form the boundary between the two countries, from, to, and into the sea, shall for ever remain free and open for the purposes of commerce to the citizens of the United States, subject to any laws and regulations of Great Britain, or of the Dominion of Canada, not inconsistent with such privilege of free navigation. Navigation of the St. Lawrence to be free.

The navigation of the Rivers Yukon, Porcupine, and Stikine, ascending and descending, from, to, and into the sea, shall for ever remain free and open for the purposes of commerce to the subjects of Her Britannic Majesty and to the citizens of the United States, subject to any laws and regulations of either country within its own territory not inconsistent with such privilege of free navigation. Other rivers.

Article XXVII.

The government of Her Britannic Majesty engages to urge upon the government of the Dominion of Canada to secure to the citizens of the United States the use of the Welland, St. Lawrence, and other canals in the Dominion on terms of equality with the inhabitants of the Dominion, and the government of the United States engages that the subjects of Her Britannic Majesty shall enjoy the use of the St. Clair Flats' Canal on terms of equality with the inhabitants of the United States, and further engages to urge upon the State governments to secure to the subjects of Her Britannic Majesty the use of the several State canals connected with the navigation of the lakes or rivers traversed by or contiguous to the boundary-line between the possessions of the High Contracting Parties on terms of equality with the inhabitants of the United States. Use in common of certain canals to be urged.

Article XXVIII.

The navigation of Lake Michigan shall also, for the term of years mentioned in Article XXXIII. of this treaty, be free and open for the purposes of commerce to the subjects of Her Britannic Majesty, subject to any laws and regulations of the United States or of the States bordering thereon not inconsistent with such privilege of free navigation. Navigation of Lake Michigan.

Article XXIX.

Through transit of goods landed in one country and destined for the other.

It is agreed that, for the term of years mentioned in Article XXXIII. of this treaty, goods, wares or merchandise arriving at the ports of New York, Boston, and Portland, and any other ports in the United States which have been or may, from time to time, be specially designated by the President of the United States, and destined for Her Britannic Majesty's possessions in North America, may be entered at the proper custom-house and conveyed in transit, without the payment of duties, through the territory of the United States, under such rules, regulations and conditions for the protection of the revenue as the government of the United States may from time to time prescribe; and, under like rules, regulations, and conditions, goods, wares, or merchandise may be conveyed in transit, without the payment of duties, from such possessions through the territory of the United States for export from the said ports of the United States.

It is further agreed that, for the like period, goods, wares, or merchandise, arriving at any of the ports of Her Britannic Majesty's possessions in North America, and destined for the United States, may be entered at the proper custom-house and conveyed in transit, without the payment of duties, through the said possessions, under such rules and regulations and conditions for the protection of the revenue as the governments of the said possessions may from time to time prescribe; and, under like rules, regulations, and conditions, goods, wares, or merchandise may be conveyed in transit, without payment of duties, from the United States through the said possessions to other places in the United States, or for export from ports in the said possessions.

Article XXX.

Carriage of goods free of duty from one place to another in the same country.

It is agreed that, for the term of years mentioned in Article XXXIII. of this treaty, subjects of Her Britannic Majesty may carry in British vessels, without payment of duty, goods, wares, or merchandise from one port or place within the territory of the United States upon the St. Lawrence, the Great Lakes, and the rivers connecting the same, to another port or place within the territory of the United States as aforesaid: provided, that a portion of such transportation is made through the Dominion of Canada by land carriage and in bond, under such rules and regulations as may be agreed upon between the government of Her Britannic Majesty and the government of the United States.

Citizens of the United States may, for the like period, carry in United States vessels, without payment of duty, goods, wares, or merchandise from one port or place within the possessions of Her Britannic Majesty in North America to another port or place within the said possessions: provided, that a portion of such transportation is made through the territory of the United States by land carriage and in bond, under such rules and regulations as may be agreed upon between the government of the United States and the government of Her Britannic Majesty.

Export duties.

The government of the United States further engages not to impose any export duties on goods, wares, or merchandise carried under this

article through the territory of the United States; and Her Majesty's government engages to urge the parliament of the Dominion of Canada and the legislatures of the other Colonies not to impose any export duties on goods, wares, or merchandise carried under this article; and the government of the United States may, in case such export duties are imposed by the Dominion of Canada, suspend, during the period that such duties are imposed, the right of carrying granted under this article in favour of the subjects of Her Britannic Majesty.

Suspension of these privileges by the United States.

The government of the United States may suspend the right of carrying granted in favour of the subjects of Her Britannic Majesty under this article, in case the Dominion of Canada should at any time deprive the citizens of the United States of the use of the canals in the said Dominion on terms of equality with the inhabitants of the Dominion, as provided in Article XXVII.

Article XXXI.

Duty on lumber cut in Maine and shipped to the United States.

The government of Her Britannic Majesty further engages to urge upon the parliament of the Dominion of Canada and the legislature of New Brunswick that no export duty, or other duty, shall be levied on lumber or timber of any kind cut on that portion of the American territory in the State of Maine watered by the River St. John and its tributaries, and floated down that river to the sea, when the same is shipped to the United States from the Province of New Brunswick. And, in case any such export or other duty continues to be levied after the expiration of one year from the date of the exchange of the ratifications of this treaty, it is agreed that the government of the United States may suspend the right of carrying hereinbefore granted under Article XXX. of this treaty for such period as such export or other duty may be levied.

Article XXXII.

Provisions of Arts. XVIII. and XXV. to extend to Newfoundland.

It is further agreed that the provisions and stipulations of Articles XVIII. to XXV. of this treaty, inclusive, shall extend to the Colony of Newfoundland so far as they are applicable. But if the Imperial parliament, the legislature of Newfoundland, or the congress of the United States, shall not embrace the Colony of Newfoundland in their laws enacted for carrying the foregoing articles into effect, then this article shall be of no effect; but the omission to make provision by law to give it effect, by either of the legislative bodies aforesaid, shall not in any way impair any other articles of this treaty.

Article XXXIII.

Arts. XVIII. to XXV. and Art. XXX. when to take effect.

The foregoing Articles XVIII. to XXV., inclusive, and Article XXX. of this treaty, shall take effect as soon as the laws required to carry them into operation shall have been passed by the Imperial parliament of Great Britain, by the parliament of Canada, and by the legislature of Prince Edward's Island on the one hand, and by the Congress of the United States on the other. Such assent having been

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given, the said articles shall remain in force for the period of ten years from the date at which they may come into operation; and further until the expiration of two years after either of the High Contracting Parties shall have given notice to the other of its wish to terminate the same; each of the High Contracting Parties being at liberty to give such notice to the other at the end of the said period of ten years or at any time afterward (*a*).

Article XXXIV.

Decision as to North-West boundary to be left to Emperor of Germany as arbitrator.

Whereas it was stipulated by Article I. of the treaty concluded at Washington on the 15th of June, 1846, between the United States and Her Britannic Majesty, that the line of boundary between the territories of the United States and those of Her Britannic Majesty, from the point on the forty-ninth parallel of north latitude up to which it had already been ascertained, should be continued westward along the said parallel of north latitude "to the middle of the channel which separates the continent from Vancouver's Island, and thence southerly, through the middle of the said channel and of Fuca Straits, to the Pacific Ocean"; and whereas the Commissioners appointed by the two High Contracting Parties to determine that portion of the boundary which runs southerly through the middle of the channel aforesaid were unable to agree upon the same; and whereas the government of Her Britannic Majesty claims that such boundary-line should, under the terms of the treaty above recited, be run through the Rosario Straits, and the government of the United States claims that it should run through the Canal de Haro, it is agreed that the respective claims of the government of the United States and of the government of Her Britannic Majesty shall be submitted to the arbitration and award of His Majesty the Emperor of Germany, who, having regard to the abovementioned article of the said treaty, shall decide thereupon, finally and without appeal, which of those claims is most in accordance with the true interpretation of the treaty of June 15, 1846.

Article XXXV.

Award to be conclusive, its form and effect.

The award of His Majesty the Emperor of Germany shall be considered as absolutely final and conclusive; and full effect shall be given to such award without any objection, evasion, or delay whatsoever. Such decision shall be given in writing and dated; it shall be in whatsoever form His Majesty may choose to adopt; it shall be delivered to the representatives or other public agents of the United States and of Great Britain, respectively, who may be actually at Berlin, and shall be considered as operative from the day of the date of the delivery thereof.

Article XXXVI.

Cases of the two

The written or printed case of each of the two parties, accompanied by the evidence offered in support of the same, shall be laid before His

(*a*) [See 35 & 36 Vict. c. 45].

Majesty the Emperor of Germany within six months from the date of the exchange of the ratifications of this treaty, and a copy of such case and evidence shall be communicated by each party to the other through their respective representatives at Berlin.

parties to be laid before the arbitrator.

The High Contracting Parties may include in the evidence to be considered by the Arbitrator such documents, official correspondence, and other official or public statements bearing on the subject of the reference as they may consider necessary to the support of their respective cases.

After the written or printed case shall have been communicated by each party to the other, each party shall have the power of drawing up and laying before the Arbitrator a second and definitive statement, if it think fit to do so, in reply to the case of the other party so communicated, which definitive statement shall be so laid before the Arbitrator, and also be mutually communicated in the same manner as aforesaid, by each party to the other, within six months from the date of laying the first statement of the case before the Arbitrator.

Counter-cases.

Article XXXVII.

If, in the case submitted to the Arbitrator, either party shall specify or allude to any report or document in its own exclusive possession without annexing a copy, such party shall be bound, if the other party thinks proper to apply for it, to furnish that party with a copy thereof, and either party may call upon the other, through the Arbitrator, to produce the originals or certified copies of any papers adduced as evidence, giving in each instance such reasonable notice as the Arbitrator may require. And if the Arbitrator should desire further elucidation or evidence with regard to any point contained in the statements laid before him, he shall be at liberty to require it from either party, and he shall be at liberty to hear one counsel or agent for each party, in relation to any matter, and at such time, and in such manner, as he may think fit.

Papers and documents.

Article XXXVIII.

The representatives or other public agents of the United States and of Great Britain at Berlin, respectively, shall be considered as the agents of their respective governments to conduct their cases before the Arbitrator, who shall be requested to address all his communications, and give all his notices, to such representatives or other public agents, who shall represent their respective governments generally in all matters connected with the arbitration.

Agents of each government.

Article XXXIX.

It shall be competent to the Arbitrator to proceed in the said arbitration, and all matters relating thereto, as and when he shall see fit, either in person, or by a person or persons named by him for that purpose, either in the presence or absence of either or both agents, and either orally or by written discussion or otherwise.

Proceedings of the arbitrator.

Article XL.

Secretary or clerk.

The Arbitrator may, if he think fit, appoint a secretary or clerk for the purposes of the proposed arbitration, at such rate of remuneration as he shall think proper. This and all other expenses of and connected with the said arbitration, shall be provided for as hereinafter stipulated.

Article XLI.

Expenses, how to be paid.

The Arbitrator shall be requested to deliver, together with his award, an account of all the costs and expenses which he may have been put to in relation to this matter, which shall forthwith be repaid by the two governments in equal moieties.

Article XLII.

Form of award.

The Arbitrator shall be requested to give his award in writing as early as convenient after the whole case on each side shall have been laid before him, and to deliver one copy thereof to each of the said agents.

Article XLIII.

Ratifications.

The present treaty shall be duly ratified by the President of the United States of America, by and with the advice and consent of the Senate thereof, and by Her Britannic Majesty; and the ratifications shall be exchanged either at Washington or at London within six months from the date hereof, or earlier if possible.

In faith whereof, we, the respective Plenipotentiaries, have signed this treaty, and have hereunto affixed our seals.

Done in duplicate at Washington the 8th day of May, in the year of our Lord 1871.

[L.S.] Hamilton Fish.
[L.S.] Robt. C. Schenck.
[L.S.] Samuel Nelson.
[L.S.] Ebenezer Rockwood Hoar.
[L.S.] Geo. H. Williams.
[L.S.] De Grey and Ripon.
[L.S.] Stafford H. Northcote.
[L.S.] Edwd. Thornton.
[L.S.] John A. Macdonald.
[L.S.] Mountague Bernard.

APPENDIX F.

EXTRACTS FROM TREATIES RELATING TO TURKEY, AND TURKISH WATERS (a).

1. *Peace of the Pruth*, 21*st July*, 1711. *Russia and Turkey.*

ARTICLE IV.

That for the future, with the exception of merchants who travel, the Czar shall not be allowed to have any one to reside at Constantinople under the name of Ambassador or Minister (b).

2. *Peace of Belgrade*, 18*th Sept.*, 1739. *Russia and Turkey.*

ARTICLE III.

The fortress of Azof shall be entirely demolished; and to ensure the peace in a manner more solid and lasting, the territory of the said fortress, according to the limits fixed by the Treaty of 1700, shall remain unoccupied, and shall serve as a barrier between the two Empires. As equivalent for this, Russia shall be allowed to construct a new fortress near the Circassian island opposite Azof, which island, situated on the River Tanais, is the ancient frontier of Russia; and, reciprocally on the part of the Ottoman Empire, it shall be permitted them to build a fortress on the frontier of Cuban opposite Azof, according to the determination which shall be made of the situation of the two said fortresses by the Commissioners named by the two parties, with whose judgment and discretion the matter shall rest: and, moreover, with the condition that the ancient fortress of Taganrog (already demolished) shall not be rebuilt, and that Russia shall not be able, neither on the Sea of Azof nor on the Black Sea, to construct and possess a fleet and other vessels.

ARTICLE IX.

Commerce . . . . . shall be allowed to merchants, subjects of the Sublime Porte, who shall be allowed to follow it freely in all the Russias, in the same manner as the merchants of other Powers, and on the payment of the same duties. And, reciprocally, all merchants, subjects of the Empire of Russia, shall be allowed to follow as freely their commerce in the States of the Ottoman Porte. But with regard to the commerce of Russians in the Black Sea, it shall be done on vessels belonging to Turks.

(a) [The following and many other Treaties on the same subjects are published in Parl. Papers, 1878 (No. 16) C. 1953.]

(b) This was revoked by another Treaty in 1720.]

3. *Treaty of Kutschouc-Kainardji*, 10*th July*, 1774. *Russia and Turkey.*

ARTICLE XI.

For the convenience and advantage of the two Empires there shall be a free and unimpeded navigation for the merchant ships belonging to the two contracting Powers in all the seas which wash their shores, &c., &c.

4. *Treaty of the Dardanelles*, 5*th Jan.*, 1809. *England and Turkey.*

ARTICLE XI.

As ships of war have at all times been prohibited from entering the Canal of Constantinople, viz., in the Straits of the Dardanelles and of the Black Sea, and as this ancient regulation of the Ottoman Empire is in future to be observed by every Power in time of peace, the Court of Great Britain promises on its part to conform to this principle.

5. In 1822 the Porte notified that the passage of the Bosphorus was closed to the ships of those nations that had not acquired the right of passing through by Treaty.

6. *Treaty of Adrianople*, 14*th Sept.*, 1829. *Russia and Turkey.*

ARTICLE VII.

The Sublime Porte engages, moreover, to take especial care that the trade and navigation of the Black Sea particularly, shall be impeded in no manner whatsoever. For this purpose it admits and declares the passage of the Strait of Constantinople and that of the Dardanelles, to be entirely free and open to Russian vessels under the merchant flag, laden or in ballast, whether they come from the Black Sea for the purpose of entering the Mediterranean, or whether, coming from the Mediterranean, they wish to enter the Black Sea; such vessels, provided they be merchant ships, whatever their size and tonnage, shall be exposed to no hindrance or annoyance of any kind, as above provided.

7. *Treaty of Unkiar-Skelessi*, 8*th July*, 1833. *Russia and Turkey. Secret Article.*

In virtue of one of the clauses of the First Article of the patent treaty of defensive alliance concluded between the Imperial Court of Russia and the Sublime Porte, the two High Contracting Parties are bound to afford to each other mutually substantial aid, and the most efficacious assistance for the safety of their respective dominions. Nevertheless, as His Majesty the Emperor of all the Russias, wishing to spare the Sublime Porte the expense and inconvenience which might be occasioned to it by affording substantial aid, will not ask for that aid if circumstances should place the Sublime Porte under the obligation of furnishing it, the Sublime Ottoman Porte in place of the aid which it is bound to furnish in case of need, according to the principle of reciprocity of the patent treaty, shall confine its action in favour of the Imperial Court of Russia to closing the Straits of the

Dardanelles, that is to say, to not allowing any foreign vessel of war to enter therein under any pretext whatsoever.

The present separate and Secret Article shall have the same force and value as if it was inserted word for word in the Treaty of Alliance of this day.

England and France protested against this Secret Article as soon as it became known to them.

8. *Convention of London, 13th July,* 1841. *England, Austria, France, Prussia, Russia, and Turkey.*

ARTICLE I.

His Highness, the Sultan, on the one part, declares that he is firmly resolved to maintain for the future the principle invariably established as the ancient rule of his Empire, and in virtue of which it has at all times been prohibited for the ships of war of foreign Powers to enter the Straits of the Dardanelles and of the Bosphorus; and that so long as the Porte is at peace, His Highness will admit no foreign ship of war into the said Straits.

And their Majesties, the Queen, &c., &c., on the other part, engage to respect this determination of the Sultan, and to conform themselves to the principle above declared.

ARTICLE II.

It is understood that in recording the inviolability of the ancient rule of the Ottoman Empire mentioned in the preceding Article, the Sultan reserves to himself, as in past times, to deliver Firmans of Passage for light vessels under flag of war, which shall be employed as is usual in the service of the Missions of Foreign Powers.

TREATY OF PARIS.

9. *General Treaty of Peace between Great Britain, Austria, France, Prussia, Russia, Sardinia, and Turkey. Signed at Paris, 30th March,* 1856.

IN the name of Almighty God.

Their Majesties the Queen of the United Kingdom of Great Britain and Ireland, the Emperor of the French, the Emperor of all the Russias, the King of Sardinia, and the Emperor of the Ottomans, animated by a desire of putting an end to the calamities of war, and wishing to prevent a return of the complications which occasioned it, resolved to come to an understanding with His Majesty the Emperor of Austria, as to the bases on which peace might be re-established and consolidated, by securing, through effectual and reciprocal guaranties, the *Independence and Integrity of the Ottoman Empire.*

Articles I. to VI. refer to the evacuation of occupied territories, the restoration of Sebastopol, &c., to Russia, and of Kars to Turkey, the exchange of prisoners of war, and the amnesty to be granted by each of the Powers to those of their subjects who might have been compromised by any participation in the war in favour of the enemy.

ARTICLE VII.

Her Majesty the Queen of the United Kingdom of Great Britain

and Ireland, His Majesty the Emperor of Austria, His Majesty the Emperor of the French, His Majesty the King of Prussia, His Majesty the Emperor of all the Russias, and His Majesty the King of Sardinia, declare the Sublime Porte admitted to participate in the advantages of the Public Law and System (*concert*) of Europe. Their Majesties engage, each on his part, to respect the independence and territorial integrity of the Ottoman Empire; guarantee in common the strict observance of that engagement; and will, in consequence, consider any act tending to its violation as a question of general interest.

Article VIII.

If there should arise between the Sublime Porte and one or more of the other signing Powers any misunderstanding which might endanger the maintenance of their relations, the Sublime Porte, and each of such Powers, before having recourse to the use of force, shall afford the other Contracting Parties the opportunity of preventing such an extremity by means of their mediation.

Article IX.

His Imperial Majesty the Sultan having, in his constant solicitude for the welfare of his subjects, issued a Firman, which, while ameliorating their condition without distinction of religion or of race, records his generous intentions towards the Christian population of his Empire, and wishing to give a further proof of his sentiments in that respect, has resolved to communicate to the Contracting Parties the said Firman, emanating spontaneously from his sovereign will.

The Contracting Powers recognize the high value of this communication. It is clearly understood that it cannot, in any case, give to the said Powers the right to interfere, either collectively or separately, in the relations of His Majesty the Sultan with his subjects, nor in the internal administration of his Empire.

Article X.

The Convention of 13th of July, 1841, which maintains the ancient rule of the Ottoman Empire relative to the closing of the Straits of the Bosphorus and of the Dardanelles has been revised by common consent.

The Act concluded for that purpose, and in conformity with that principle, between the High Contracting Parties, is and remains annexed to the present Treaty, and shall have the same force as if it formed an integral part thereof.

Article XI.

The Black Sea is neutralized; its waters and its ports, thrown open to the mercantile marine of every nation, are formally and in perpetuity interdicted to the flag of war, either of the Powers possessing its coasts, or of any other Power, with the exceptions mentioned in Articles XIV. and XIX. of the present Treaty (c).

Article XII.

Free from any impediment, the commerce in the ports and waters of the Black Sea, shall be subject only to regulations of health,

(c) [Abrogated on the 13th March, 1871.]

customs, and police, framed in a spirit favourable to the development of commercial transactions.

In order to afford to the commercial and maritime interests of every nation the security which is desired, Russia and the Sublime Porte will admit Consuls into their ports situated upon the coast of the Black Sea, in conformity with the principles of international law.

ARTICLE XIII.

The Black Sea being neutralized according to the terms of Article XI., the maintenance or establishment upon its coast of military-maritime arsenals becomes alike unnecessary and purposeless; in consequence, His Majesty the Emperor of all the Russias, and His Imperial Majesty the Sultan, engage not to establish or to maintain upon that coast any military-maritime arsenal (*d*).

ARTICLE XIV.

Their Majesties the Emperor of all the Russias and the Sultan having concluded a Convention for the purpose of settling the force and the number of light vessels, necessary for the service of their coasts, which they reserve to themselves to maintain in the Black Sea, that Convention is annexed to the present Treaty, and shall have the same force and validity as if it formed an integral part thereof. It cannot be either annulled or modified without the assent of the Powers signing the present Treaty (*d*).

Articles XV. to XIX. provide for the navigation of the Danube.

ARTICLE XX.

In exchange for the towns, ports, and territories enumerated in Article IV. of the present Treaty, and in order more fully to secure the freedom of the navigation of the Danube, His Majesty the Emperor of all the Russias consents to the rectification of his frontier in Bessarabia.

The new frontier shall begin from the Black Sea, one kilometre to the east of the Lake Bourna Sola, shall run perpendicularly to the Akerman Road, shall follow that road to the Val de Trajan, pass to the south of Bolgrad, ascend the course of the River Yalpuck to the Height of Saratsika, and terminate at Katamori on the Pruth. Above that point the old frontier between the two Empires shall not undergo any modification (*e*).

Delegates of the Contracting Powers shall fix, in its details, the line of the new frontier.

ARTICLE XXI.

The territory ceded by Russia shall be annexed to the Principality of Moldavia, under the Suzerainty of the Sublime Porte.

The inhabitants of that territory shall enjoy the rights and privileges secured to the Principalities; and during the space of three years they shall be permitted to transfer their domicile elsewhere, disposing freely of their property.

(*d*) [Abrogated in 1871.]

(*e*) [This territory was given back to Russia in 1878 by the Treaty of Berlin, and the following articles relating to Roumania and Servia were at the same time annulled.]

Article XXII.

The Principalities of Wallachia and Moldavia shall continue to enjoy under the Suzerainty of the Porte, and under the guarantee of the Contracting Powers, the privileges and immunities of which they are in possession. No exclusive protection shall be exercised over them by any of the guaranteeing Powers.

There shall be no separate right of interference in their internal affairs.

Article XXIII.

The Sublime Porte engages to preserve to the said Principalities an independent and national administration, as well as full liberty of worship, of legislation, of commerce, and navigation.

The rest of Article XXIII., and Articles XXIV. to XXVII., refer to the internal condition of the Principalities.

Article XXVIII.

The Principality of Servia shall continue to hold of the Sublime Porte, in conformity with the Imperial Hats which fix and determine its rights and immunities placed henceforward under the collective guarantee of the Contracting Powers.

In consequence, the said Principality shall preserve its independence and national administration, as well as full liberty of worship, of legislation, of commerce, and of navigation.

Article XXIX.

The right of garrison of the Sublime Porte, as stipulated by anterior regulations, is maintained (*f*). No armed intervention can take place in Servia without previous agreement between the High Contracting Powers.

Article XXX.

His Majesty the Emperor of All the Russias and His Majesty the Sultan maintain in its integrity the state of their possessions in Asia, such as it legally existed before the rupture (*g*).

By Articles XXXI. and XXXII. it was agreed that Russian territory should be evacuated by the allied troops, and that commerce should continue as before between the parties, and in other matters their subjects should be respectively treated upon the footing of the most favoured nation.

Straits Convention—Dardanelles and Bosphorus.

10. *Convention between Great Britain, Austria, France, Prussia, Russia, and Sardinia on the one part, and the Sultan on the other part, respecting the Straits of the Dardanelles and of the Bosphorus. Signed at Paris, 30th March,* 1856.

Article I.

His Majesty the Sultan, on the one part, declares that he is firmly resolved to maintain for the future the principle invariably established

(*f*) [This right was renounced by Turkey on the 10th April, 1867.]
(*g*) [Abrogated in 1878.]

as the ancient rule of his Empire, and in virtue of which it has, at all times, been prohibited for the ships of war of foreign Powers to enter the Straits of the Dardanelles and of the Bosphorus, and that so long as the Porte is at peace, His Majesty will admit no foreign ship of war into the said Straits.

And their Majesties (the sovereigns of the Contracting Parties) on the other part engage to respect this determination of the Sultan, and to conform themselves to the principle above declared.

ARTICLE II.

The Sultan reserves to himself, as in past times, to deliver Firmans of Passage for light vessels under flag of war, which shall be employed, as is usual, in the Missions of foreign Powers.

ARTICLE III.

The same exception applies to light vessels under flag of war which each of the Contracting Powers is authorized to station at the mouths of the Danube in order to secure the execution of the regulations relative to the liberty of that river, and the number of which is not to exceed two for each Power.

GUARANTY OF INTEGRITY OF OTTOMAN EMPIRE.

11. *Treaty between Great Britain, Austria, and France, guaranteeing the Independence and Integrity of the Ottoman Empire. Signed at Paris, 15th April,* 1856.

ARTICLE I.

The High Contracting Parties guarantee, jointly and severally, the independence and the integrity of the Ottoman Empire, recorded in the Treaty concluded at Paris on the 30th of March, 1856.

ARTICLE II.

Any infraction of the stipulations of the said Treaty will be considered by the Powers signing the present Treaty, as a *casus belli.* They will come to an understanding with the Sublime Porte as to the measures which have become necessary, and will without delay determine among themselves as to the employment of their military or naval forces.

NAVAL FORCE IN THE BLACK SEA.

12. *Convention between Russia and Turkey limiting their Naval Force in the Black Sea. Signed at Paris, 30th March,* 1856 *(h).*

ARTICLE I.

The High Contracting Parties mutually engage not to have in the Black Sea any other vessels of war than those of which the number, the force, and the dimensions are hereinafter stipulated.

(*h*) [Abrogated 13th March, 1871.]

Article II.

The High Contracting Parties reserve to themselves each to maintain in that Sea, six steam vessels of 50 metres in length at the line of flotation, of a tonnage of 800 tons at the maximum, and four light steam or sailing vessels of a tonnage which shall not exceed 200 tons each.

Inviolability of Treaties.

13. *Declaration between Great Britain, Austria, France, Italy, North Germany, Russia, and Turkey, as to non-alteration of Treaties without consent of Contracting Parties. London, 17th January,* 1871.

The Plenipotentiaries of North Germany, of Austria-Hungary, of Great Britain, of Italy, of Russia, and of Turkey, assembled to-day in Conference, recognise that it is an essential principle of the Law of Nations that no Power can liberate itself from the engagements of a treaty, nor modify the stipulations thereof, unless with the consent of the Contracting Powers by means of an amicable arrangement.

Treaty of London, 1871.

14. *Treaty between Great Britain, Austria, France, Germany (Prussia), Italy, Russia, and Turkey, for the Revision of certain Stipulations of the Treaties of* 30*th March,* 1856, *relative to the Black Sea and Danube. Signed at London,* 13*th March,* 1871.

Article I.

Articles XI., XIII., and XIV. of the Treaty of Paris of the 30th March, 1856, as well as the Special Convention concluded between Russia and the Sublime Porte, and annexed to the said Article XIV., are abrogated, and replaced by the following Article.

Article II.

The principle of the closing of the Straits of the Dardanelles and the Bosphorus such as it has been established by the separate Convention of the 30th of March, 1856, is maintained, with power to His Imperial Majesty the Sultan to open the Straits in time of peace to the vessels of war of friendly and allied Powers, in case the Sublime Porte should judge it necessary in order to secure the execution of the stipulations of the Treaty of Paris of the 30th March, 1856.

Article III.

The Black Sea remains open, as heretofore, to the Mercantile Marine of all nations.

The remaining Articles of this Treaty (Arts. IV. to IX.) provide for the maintenance and neutrality of the navigation of the Danube. A separate Treaty was also signed by Russia and Turkey on the 13th of March, 1871, by which the former Treaty of the 30th of March, 1856, between these two States, was abrogated.

TREATY OF BERLIN, 1878.

15. *Treaty between Great Britain, Germany, Austria, France, Italy, Russia, and Turkey. Signed at Berlin, 13th July,* 1878.

Article I.

Bulgaria is constituted an autonomous and tributary Principality under the suzerainty of His Imperial Majesty the Sultan; it will have a Christian Government and a national militia.

Article II.

The Principality of Bulgaria will include the following territories:—

The frontier follows on the north the right bank of the Danube from the former frontier of Servia up to a point to be determined by a European Commission to the east of Silistria, and thence runs to the Black Sea to the south of Mangalia, which is included in Roumanian territory. The Black Sea forms the eastern boundary of Bulgaria. On the south the frontier follows upwards from its mouth the mid-channel of the brook near which are situated the villages of Hodžakiöj, Selam-Kiöj, Aivadšik, Kulibe, Sudžuluk; crosses obliquely the valley of the Deli-Kamčik, passes south of Belibe and Kemhalik and north of Hadžimahale after having crossed the Deli-Kamčik at 2½ kilom. above Čengei; reaches the crest at a point situated between Tekenlik and Aidos-Bredza, and follows it by Karnabad Balkan, Prisevica Balkan, Kazan Balkan to the north of Kotel as far as Demir Kapu. It proceeds by the principal chain of the Great Balkan, the whole length of which it follows up to the summit of Kosica.

There it leaves the crest of the Balkan, descends southwards between the villages of Pirtop and Dužanci, the one being left to Bulgaria and the other to Eastern Roumelia, as far as the brook of Tuzlu Dere, follows that stream to its junction with the Topolnica, then the latter river until it meets the Smovskio Dere near the village of Petricevo, leaving to Eastern Roumelia a zone with a radius of 2 kilom. above that junction, ascends between the brooks of Smovskio Dere and the Kamenica, following the line of the watershed so as to turn to the south-west at the level of Voinjak and reach directly the point 875 of the Austrian Staff map.

The frontier line cuts at right angles the upper basin of the brook of Ichtiman Dere, passes between Bogdina and Karaúla, so as to rejoin the line of the watershed separating the basins of the Isker and the Marica, between Čamurli and Hadžilar, follows that line by the summits of Velina Mogila, the "col" 531, Zmailica Vrh, Sumnatica, and rejoins the administrative boundary of the Sandjak of Sofia between Sivri Taš and Čadir Tepe.

From Čadir Tepe, the frontier, taking a south-westerly direction, follows the watershed between the basins of the Mesta Karasu on the one side and the Struma Karasu on the other, runs along the crests of the mountains of Rhodope called Demir Kapu, Iskoftepe, Kadimesar Balkan, and Aiji Gedük up to Kapetnik Balkan, and thus joins the former administrative frontier of the Sandjak of Sofia.

From Kapetnik Balkan the frontier is indicated by the watershed between the valleys of the Rilska reka and of the Bistrica reka, and follows the ridge called Vodenica Planina, descending into the valley of the Struma at the junction of this river with the Rilska reka, leaving the village of Barakli to Turkey. It ascends then south of the village of Jelešnica, and reaches by the shortest line the chain of Golema Planina at the summit of Gitka, and rejoins there the former administrative frontier of the Sandjak of Sofia, leaving, however, to Turkey the whole of the basin of the Suha reka.

From Mount Gitka the western frontier goes towards Mount Crni Vrh by the mountains of Karvena Jabuka, following the former administrative limit of the Sandjak of Sofia in the upper part of the basins of Egrisu and of the Lepnica, ascends with it the crests of Babina Polana, and reaches Mount Crni Vrh.

From Mount Crni Vrh the frontier follows the watershed between the Struma and the Morava by the summits of the Strešer, Vilogolo, and Mešid Planina, rejoins by the Gačina, Crna Trava, Darkovska, and Drainica Plan, then the Deščani Kladanec, the watershed of the High Sukowa and of the Morava, goes straight to the Stol, and descends from it so as to cut the road from Sofia to Pirot, 1,000 metres north-west of the village of Seguša. It ascends in a straight line the Vidlic Planina and thence Mount Radočina in the chain of the Kodža Balkan, leaving to Servia the village of Doikinci, and to Bulgaria that of Senakos.

From the summit of Mount Radočina the frontier follows towards the west the crest of the Balkans by Ciprovec Balkan and Stara Planina up to the former eastern frontier of the Principality of Servia, near to the Kula Smiljova Čuka, and thence that former frontier as far as the Danube, which it rejoins at Rakovitza.

This delimitation shall be fixed on the spot by the European Commission, on which the Signatory Powers shall be represented. It is understood—

1. That this Commission will take into consideration the necessity for His Imperial Majesty the Sultan to be able to defend the Balkan frontiers of Eastern Roumelia.

2. That no fortifications may be erected within a radius of 10 kilom. from Samakow.

Article III.

The Prince of Bulgaria shall be freely elected by the population and confirmed by the Sublime Porte, with the assent of the Powers. No member of the Reigning Dynasties of the Great European Powers may be elected Prince of Bulgaria.

In case of a vacancy in the princely dignity, the election of the new Prince shall take place under the same conditions and with the same forms.

Article IV.

An Assembly of Notables of Bulgaria, convoked at Tirnovo, shall, before the election of the Prince, draw up the Organic Law of the Principality.

In the districts where Bulgarians are intermixed with Turkish,

Roumanian, Greek, or other populations, the rights and interests of these populations shall be taken into consideration as regards the elections and the drawing up of the Organic Law.

Article V.

The following points shall form the basis of the public law of Bulgaria :—

The difference of religious creeds and confessions shall not be alleged against any person as a ground for exclusion or incapacity in matters relating to the enjoyment of civil and political rights, admission to public employments, functions, and honours, or the exercise of the various professions and industries in any locality whatsoever.

The freedom and outward exercise of all forms of worship are assured to all persons belonging to Bulgaria, as well as to foreigners, and no hindrance shall be offered either to the hierarchical organization of the different communions, or to their relations with their spiritual chiefs.

Article VI.

The provisional administration of Bulgaria shall be under the direction of an Imperial Russian Commissary until the completion of the Organic Law. An Imperial Turkish Commissary, as well as the Consuls delegated *ad hoc* by the other Powers, signatory of the present Treaty, shall be called to assist him so as to control the working of this provisional *régime*. In case of disagreement amongst the Consular Delegates, the vote of the majority shall be accepted, and in case of a divergence between the majority and the Imperial Russian Commissary or the Imperial Turkish Commissary, the Representatives of the Signatory Powers at Constantinople, assembled in Conference, shall give their decision.

Article VII.

The provisional *régime* shall not be prolonged beyond a period of nine months from the exchange of the ratifications of the present Treaty.

When the Organic Law is completed the election of the Prince of Bulgaria shall be proceeded with immediately. As soon as the Prince shall have been installed, the new organization shall be put into force, and the Principality shall enter into the full enjoyment of its autonomy.

Article VIII.

The Treaties of Commerce and of Navigation as well as all the Conventions and arrangements concluded between Foreign Powers and the Porte, and now in force, are maintained in the Principality of Bulgaria, and no change shall be made in them with regard to any Power without its previous consent.

No transit duties shall be levied in Bulgaria on goods passing through that Principality.

The subjects and citizens and commerce of all the Powers shall be treated in the Principality on a footing of strict equality.

The immunities and privileges of foreigners, as well as the rights of

Consular jurisdiction and protection as established by the Capitulations and usages, shall remain in full force so long as they shall not have been modified with the consent of the parties concerned.

Article IX.

The amount of the annual tribute which the Principality of Bulgaria shall pay to the Suzerain Court—such amount being paid into whatever bank the Porte may hereafter designate—shall be fixed by an agreement between the Powers Signatory of the present Treaty at the close of the first year of the working of the new organization. This tribute shall be calculated on the mean revenue of the territory of the Principality.

As Bulgaria is to bear a portion of the public debt of the Empire, when the Powers fix the tribute they shall take into consideration what portion of that debt can, on the basis of a fair proportion, be assigned to the Principality.

Article X.

Bulgaria takes the place of the Imperial Ottoman Government in its undertakings and obligations towards the Rustchuk-Varna Railway Company, dating from the exchange of the ratifications of the present Treaty. The settlement of the previous accounts is reserved for an understanding between the Sublime Porte, the Government of the Principality, and the administration of this Company.

The Principality of Bulgaria likewise, so far as it is concerned, takes the place of the Sublime Porte in the engagements which the latter has contracted, as well towards Austria-Hungary as towards the Company for working the railways of European Turkey in respect to the completion and connection, as well as the working of the railways situated in its territory.

The Conventions necessary for the settlement of these questions shall be concluded between Austria-Hungary, the Porte, Servia, and the Principality of Bulgaria immediately after the conclusion of peace.

Article XI.

The Ottoman army shall no longer remain in Bulgaria; all the old fortresses shall be razed at the expense of the Principality within one year or sooner if possible; the local Government shall immediately take steps for their demolition, and shall not construct fresh ones.

The Sublime Porte shall have the right of disposing as it likes of the war material and other effects belonging to the Ottoman Government which may have remained in the fortresses of the Danube already evacuated in virtue of the Armistice of the 31st January, as well as of those in the strongholds of Shumla and Varna.

Article XII.

Mussulman proprietors or others who may take up their abode outside the Principality may continue to hold there their real property, by farming it out, or having it administered by third parties.

A Turco-Bulgarian Commission shall be appointed to settle, within a period of two years, all questions relative to the mode of alienation,

working, or use on the account of the Sublime Porte, of property belonging to the State and religious foundations (Vakoufs), as well as of the questions regarding the interests of private persons engaged therein.

Persons belonging to the Principality of Bulgaria, who shall travel or dwell in the other parts of the Ottoman Empire, shall be subject to the Ottoman authorities and laws.

Article XIII.

A province is formed south of the Balkans which will take the name of "Eastern Roumelia," and will remain under the direct political and military authority of His Imperial Majesty the Sultan, under conditions of administrative autonomy. It shall have a Christian Governor-General.

Article XIV.

Eastern Roumelia is bounded on the north and north-west by Bulgaria, and comprises the territories included by the following line:—

Starting from the Black Sea the frontier follows upwards from its mouth the mid-channel of the brook near which are situated the villages of Hodzakiöj, Selam-Kiöj, Aivadšik, Kulibe, Sudžuluk, crosses obliquely the Valley of the Deli-Kamčik, passes south of Belibe and Kemhalik, and north of Hadžimahale, after having crossed the Deli-Kamčik at 2½ kilom. above Čengei; reaches the crest at a point situated between Tekenlik and Aidos-Bredza, and follows it by Karnabad Balkan, Prisevica Balkan, Kazan Balkan to the north of Kotel as far as Demir Kapu. It proceeds by the principal chain of the Great Balkan, the whole length of which it follows up to the summit of Kosica.

At this point the western frontier of Roumelia leaves the crest of the Balkan, descends southwards between the villages of Pirtop and Dužanci—the one being left to Bulgaria and the other to Eastern Roumelia, as far as the brook of Tuzlu Dere, follows that stream to its junction with the Topolnica, then the latter river until it meets the Smovskio Dere near the village of Petričevo, leaving to Eastern Roumelia a zone with a radius of 2 kilom. above that junction, ascends between the brooks of Smovskio Dere and the Kamenica, following the line of the watershed so as to turn to the south-west at the level of Voinjak and reach directly the point 875 of the Austrian Staff map.

The frontier line cuts at right angles the upper basin of the brook of Ichtiman Dere, passes between Bogdina and Karatila, so as to rejoin the line of the watershed separating the basins of the Isker and the Marica, between Čamurli and Hadžilar, follows that line by the summits of Velina Mogila, the "col" 531, Zmailica Vrh, Summatica, and rejoins the administrative boundary of the Sandjak of Sofia between Sivri Taš and Čadir Tepe.

The frontier of Roumelia leaves that of Bulgaria at Mount Čadir Tepe, following the line of the watershed between the basins of the Marica and of its affluents on one side, and of the Mesta Karasu and

of its affluents on the other, and takes the direction south-east and then south along the crest of the Despoto Dagh Mountains, towards Mount Kruschowa (whence starts the frontier line of the Treaty of San Stefano).

From Mount Kruschowa the frontier is the same as the line laid down by the Treaty of San Stefano, that is to say, the chain of the Black Balkans (Kara Balkan), the mountains Kulaghy-Dagh, Eschek-Tschepellü, Karakolas, and Ischiklar, from whence it descends due south-east till it reaches the River Arda, and follows the mid-channel of this river up to a point close to the village of Adacali, which remains to Turkey.

From this point the frontier line ascends the crest of the Beštepe-Dagh, which it follows, then descends and crosses the Maritza, at a point situated 5 kilom. above the bridge of Mustafa Pasha; thence it takes a northerly direction by the line of the watershed between Demirhanli Dere and the small affluents of the Maritza to Küdeler Baïr, whence it runs east to Sakar Baïr; from this point it crosses the valley of the Tundža in the direction of Büjük Derbend, which is left to the north, as also is Soudzak. From Büjük Derbend it regains the line of the watershed between the affluents of the Tundža on the north and those of the Maritza on the south, up to the level of Kaibilar, which is included in Eastern Roumelia, and passes to the south of V. Almali between the basin of the Maritza to the south and the various streams which flow straight into the Black Sea, between the villages of Belevrin and Alatli; it follows to the north of Karanlik the crests of Vesna and Zuvak, the line which separates the waters of the Duka and those of the Karagac-Su, and rejoins the Black Sea between those two rivers.

Article XV.

His Majesty the Sultan shall have the right of providing for the defence of the land and sea frontiers of the province by erecting fortifications on those frontiers, and maintaining troops there.

Internal order is maintained in Eastern Roumelia by a native gendarmerie assisted by a local militia.

In forming these corps, the officers of which are nominated by the Sultan, regard shall be paid in the different localities to the religion of the inhabitants.

His Imperial Majesty the Sultan undertakes not to employ irregular troops, such as Bashi-Bazouks and Circassians, in the garrisons of the frontiers. The regular troops detailed for this service must not in any case be billeted on the inhabitants. When they pass through the province they shall not make a stay there.

Article XVI.

The Governor-General shall have the right of summoning the Ottoman troops in the event of the internal or external security of the province being threatened. In such an eventuality the Sublime Porte shall inform the Representatives of the Powers at Constantinople of such a decision, as well as of the exigencies which justify it.

Article XVII.

The Governor-General of Eastern Roumelia shall be nominated by the Sublime Porte, with the assent of the Powers, for a term of five years.

Article XVIII.

Immediately after the exchange of the ratifications of the present Treaty, a European Commission shall be formed to arrange, in concert with the Ottoman Porte, the organization of Eastern Roumelia. This Commission will have to determine, within three months, the powers and functions of the Governor-General, as well as the administrative, judicial, and financial system of the province, taking as its basis the various laws for the vilayets and the proposals made in the eighth sitting of the Conference of Constantinople.

The whole of the arrangements determined on for Eastern Roumelia shall form the subject of an Imperial Firman, which will be issued by the Sublime Porte, and which it will communicate to the Powers.

Article XIX.

The European Commission shall be charged to administer, in concert with the Sublime Porte, the finances of the province until the completion of the new organization.

Article XX.

The Treaties, Conventions, and international arrangements of any kind whatsoever, concluded or to be concluded between the Porte and foreign Powers, shall apply in Eastern Roumelia as in the whole Ottoman Empire. The immunities and privileges acquired by foreigners, whatever their status, shall be respected in this province. The Sublime Porte undertakes to enforce there the general laws of the Empire on religious liberty in favour of all forms of worship.

Article XXI.

The rights and obligations of the Sublime Porte with regard to the railways of Eastern Roumelia are maintained in their integrity.

Article XXII.

The strength of the Russian corps of occupation in Bulgaria and Eastern Roumelia, which shall be composed of six divisions of infantry and two divisions of cavalry, shall not exceed 50,000 men. It shall be maintained at the expense of the country occupied. The army of occupation will preserve its communications with Russia not only through Roumania, in accordance with arrangements to be concluded between the two States, but also through the ports of the Black Sea, Varna and Bourgas, where it may, during the period of occupation, organize the necessary depôts.

The period of the occupation of Eastern Roumelia and Bulgaria by the Imperial Russian troops is fixed at nine months from the date of the exchange of the ratifications of the present Treaty.

The Imperial Russian Government undertakes that within a further period of three months the passage of its troops across Roumania shall cease, and that Principality shall be completely evacuated.

Article XXIII.

The Sublime Porte undertakes scrupulously to apply in the Island of Crete the Organic Law of 1868, with such modifications as may be considered equitable.

Similar laws adapted to local requirements, excepting as regards the exemption from taxation granted to Crete, shall also be introduced into the other parts of Turkey in Europe for which no special organization has been provided by the present Treaty.

The Sublime Porte shall depute special Commissions, in which the native element shall be largely represented, to settle the details of the new laws in each province.

The schemes of organization resulting from these labours shall be submitted for examination to the Sublime Porte, which, before promulgating the Acts for putting them into force, shall consult the European Commission instituted for Eastern Roumelia.

Article XXIV.

In the event of the Sublime Porte and Greece being unable to agree upon the rectification of frontier suggested in the 13th Protocol of the Congress of Berlin, Germany, Austria-Hungary, France, Great Britain, Italy, and Russia reserve to themselves to offer their mediation to the two parties to facilitate negotiations.

Article XXV.

The Provinces of Bosnia and Herzegovina shall be occupied and administered by Austria-Hungary. The Government of Austria-Hungary not desiring to undertake the administration of the Sandjak of Novi-Bazar, which extends between Servia and Montenegro in a south-easterly direction to the other side of Mitrovitza, the Ottoman Administration will continue to exercise its functions there. Nevertheless, in order to assure the maintenance of the new political state of affairs, as well as freedom and security of communications, Austria-Hungary reserves the right of keeping garrisons and having military and commercial roads in the whole of this part of the ancient Vilayet of Bosnia. To this end the Governments of Austria-Hungary and Turkey reserve to themselves to come to an understanding on the details.

Article XXVI.

The independence of Montenegro is recognized by the Sublime Porte and by all those of the High Contracting Parties who had not hitherto admitted it.

Article XXVII.

The High Contracting Parties are agreed on the following conditions :—

In Montenegro the difference of religious creeds and confessions shall not be alleged against any person as a ground for exclusion or incapacity in matters relating to the enjoyment of civil and political rights, admission to public employments, functions, and honours, or the exercise of the various professions and industries in any locality whatsoever.

The freedom and outward exercise of all forms of worship shall be

assured to all persons belonging to Montenegro, as well as to foreigners, and no hindrance shall be offered either to the hierarchical organization of the different communions, or to their relations with their spiritual chiefs.

Article XXVIII.

The new frontiers of Montenegro are fixed as follows :—

Starting at Ilino-brdo to the north of Klobuk, the line descends to the Trebinjčica towards Grančarevo, which remains to Herzegovina, then ascends the course of that river up to a point 1 kilom. below its confluence with the Čepelica, and from thence passes by the most direct line on to the heights which border the River Trebinjčica. It then proceeds in the direction of Pilatova, leaving that village to Montenegro, and continues along the heights in a northerly direction, maintaining, as far as possible a distance of 6 kilom. from the Bilek-Korito-Gacko road, up to the "col" between the Somina Planina and Mount Čurilo, whence it proceeds in an easterly direction by Vratkoviči, leaving this village to Herzegovina, up to Mount Orline. Starting from this point the frontier, leaving Ravno to Montenegro, goes straight to the north-north-east, crossing the summits of the Leberšnik and of the Volujak, then descends by the shortest line on to the River Piva, which it crosses, and rejoins the River Tara, passing between Crkvica and Nedvina. From this point it ascends the Tara to Mojkovac, from which place it passes along the crest of the ridge as far as Siškojezero. Leaving this point, it coincides with the former frontier as far as the village of Sekulare. From there the new frontier passes along the crests of the Mokra Planina, the village of Mokra remaining to Montenegro; it then reaches the point 2166 on the Austrian Staff Map, following the principal chain and the line of the watershed between the Lim on the one side, and the Drin as well as the Cievna (Zem) on the other.

It then coincides with the existing boundaries between the tribe of the Kuči-Drekaloviči on one side, and the Kučka-Krajna, as well as the tribes of the Klementi and Grudi, on the other, to the plain of Podgorica, from whence it proceeds towards Plavnica, leaving the Klementi, Grudi, and Hoti tribes to Albania.

Thence the new frontier crosses the lake near the Islet of Gorica-Topal, and, from Gorica-Topal, takes a straight line to the top of the crest, whence it follows the watershed between Megured and Kalimed, leaving Mrkovič to Montenegro, and reaching the Adriatic at V. Kruči.

On the north-west the frontier will be formed by a line passing from the coast between the villages of Sušana and Zubči, and terminating at the extreme south-east point of the existing frontier of Montenegro on the Vrsuta Planina.

Article XXIX.

Antivari and its sea-board are annexed to Montenegro under the following conditions :—

The districts situated to the south of that territory, in accordance with the delimitation above laid down, as far as the Boyana, including Dulcinjo, shall be restored to Turkey.

The Commune of Spiča, as far as the southernmost point of the

territory indicated in the detailed description of the frontiers, shall be incorporated with Dalmatia.

Montenegro shall have full and complete freedom of navigation on the Boyana. No fortifications shall be constructed on the course of that river except such as may be necessary for the local defence of the stronghold of Scutari, and they shall not extend beyond a distance of 6 kilom. from that town.

Montenegro shall have neither ships of war nor flag of war.

The port of Antivari and all the waters of Montenegro shall remain closed to the ships of war of all nations.

The fortifications situated on Montenegrin territory between the lake and the coast shall be razed, and none shall be rebuilt within this zone.

The administration of the maritime and sanitary police, both at Antivari and along the coast of Montenegro, shall be carried out by Austria-Hungary by means of light coast-guard boats.

Montenegro shall adopt the maritime code in force in Dalmatia. On her side Austria-Hungary undertakes to grant Consular protection to the Montenegrin merchant flag.

Montenegro shall come to an understanding with Austria-Hungary on the right to construct and keep up across the new Montenegrin territory a road and a railway.

Absolute freedom of communication shall be guaranteed on these roads.

Article XXX.

Mussulmans or others possessing property in the territories annexed to Montenegro, who may wish to take up their residence outside the Principality, can retain their real property either by farming it out, or by having it administered by third parties.

No one shall be liable to be expropriated otherwise than by legal process for the public welfare, and with a previous indemnity.

A Turco-Montenegrin Commission shall be appointed to settle, within a period of three years, all questions relative to the mode of alienation, working, or use, on the account of the Sublime Porte, of property belonging to the State and religious foundations (Vakoufs) as well as of the questions regarding the interests of private parties engaged therein.

Article XXXI.

The Principality of Montenegro shall come to a direct understanding with the Ottoman Porte with regard to the establishment of Montenegrin agents at Constantinople, and at certain places in the Ottoman Empire where the necessity for them shall be admitted.

Montenegrins travelling or residing in the Ottoman Empire shall be subject to the Ottoman laws and authorities, according to the general principles of international law, and the customs established with regard to Montenegrins.

Article XXXII.

The Montenegrin troops shall be bound to evacuate within twenty days from the date of the ratification of the present Treaty, or sooner

if possible, the territory that they occupy at present beyond the new limits of the Principality.

The Ottoman troops shall evacuate the territories ceded to Montenegro within the same period of twenty days. A supplementary period of fifteen days shall, however, be granted to them, as well for evacuating the fortresses and withdrawing the stores and material of war from them, as for drawing up inventories of the implements and articles which cannot be immediately removed.

Article XXXIII.

As Montenegro is to bear a portion of the Ottoman public debt for the new territories assigned to her by the Treaty of Peace, the representatives of the Powers at Constantinople shall determine the amount of the same in concert with the Sublime Porte on an equitable basis.

Article XXXIV.

The High Contracting Parties recognise the independence of the Principality of Servia, subject to the conditions set forth in the following article.

Article XXXV.

In Servia the difference of religious creeds and confessions shall not be alleged against any person as a ground for exclusion or incapacity in matters relating to the enjoyment of civil and political rights, admission to public employments, functions, and honours, or the exercise of the various professions and industries, in any locality whatsoever.

The freedom and outward exercise of all forms of worship shall be assured to all persons belonging to Servia, as well as to foreigners, and no hindrance shall be offered either to the hierarchical organization of the different communions, or to their relations with their spiritual chiefs.

Article XXXVI.

Servia receives the territories included in the following delimitation :—

The new frontier follows the existing line ascending the mid-channel of the Drina from its confluence with the Save, leaving Mali-Zwornik and Sakhar to the Principality, and continues to follow the former boundary of Servia as far as the Kapaonik, leaving it at the summit of the Kanilug. From that point it follows at first the western boundary of the Sandjak of Nisch by the southern spur of the Kopaonik, by the crests of the Marica and Mrdar Planina, which form the watershed between the basins of the Ibar and Sitnica on one side, and that of the Toplica on the other, leaving Prepolac to Turkey.

It then turns to the south by the watershed between the Brvenica and the Medvedja, leaving the whole of the basin of the Medvedja to Servia: follows the crests of the Goljak Planina (which forms the watershed between the Kriva-Rjeka on the one side and the Poljanica, Veternica, and Morawa on the other), as far as the summit of the Poljanica. It then follows the spur of the Karpina Planina as far as the confluence of the Koinska and the Morawa, crosses this river, and

ascends by the watershed between the Koinska brook and the stream which falls into the Morawa near Neradovce, to reach the Sv. Ilija Planina above Trgovište. Thence it follows the crest of the Sv. Ilija as far as Mount Kljuc, and passing by the points marked 1516 and 1547 on the map, and by the Babina Gora, it reaches Mount Crni-Vrh.

From Mount Crni-Vrh, the new delimitation coincides with that of Bulgaria, that is to say:—

The line of frontier follows the watershed between the Struma and the Morava by the summits of Strešer, Vilogolo, and Mešid Planina, rejoins by the Gačina, Crna Trava, Darkovska, and Drainica Plan, then the Deščani Kladanec, the watershed of the High Sukowa and of the Morava, goes straight to the Stol, and descends from it so as to cut the road from Sofia to Pirot, 1,000 metres north-west of the village of Seguša. It ascends in a straight line the Vidlić Planina, and thence Mount Radočina in the chain of the Kodža Balkan, leaving to Servia the village of Doikinci, and to Bulgaria that of Senakos.

From the summit of Mount Radočina the frontier follows towards the north-west, the crest of the Balkans by Ciprovec Balkan and Stara Planina up to the former eastern frontier of the Principality of Servia, near to the Kula Smiljova čuka, and thence that former frontier as far as the Danube, which it joins at Rakovitza.

Article XXXVII.

Until the conclusion of fresh arrangements no change shall be made in Servia in the actual conditions of the commercial intercourse of the Principality with foreign countries.

No transit duties shall be levied on goods passing through Servia.

The immunities and privileges of foreign subjects, as well as the rights of Consular jurisdiction and protection, as at present existing, shall remain in full force so long as they shall not have been modified by mutual consent between the Principality and the Powers concerned.

Article XXXVIII.

The Principality of Servia takes the place, so far as it is concerned, of the Sublime Porte in the engagements which the latter has contracted as well towards Austria-Hungary as towards the Company for the working of the railways of Turkey in Europe, in respect to the completion and connection, as well as the working of the railways to be constructed on the territory newly acquired by the Principality.

The Conventions necessary for settling these questions shall be concluded, immediately after the signature of the present Treaty, between Austria-Hungary, the Porte, Servia, and, within the limits of its competency, the Principality of Bulgaria.

Article XXXIX.

Mussulmans possessing property in the territories annexed to Servia, who may wish to reside outside the Principality, may retain their real property, either by farming it out or by having it administered by third parties.

A Turco-Servian Commission shall be appointed to settle, within a period of three years, all questions relative to the mode of alienation,

working, or use, on the account of the Sublime Porte, of the property belonging to the State and religious foundations (Vakoufs), as well as of the questions regarding the interests of private persons engaged therein.

Article XL.

Until the conclusion of a Treaty between Turkey and Servia, Servian subjects travelling or residing in the Ottoman Empire shall be treated according to the general principles of international law.

Article XLI.

The Servian troops shall be bound to evacuate within fifteen days from the exchange of the ratifications of the present Treaty the territory not comprised within the new limits of the Principality.

The Ottoman troops shall evacuate the territories ceded to Servia within the same term of fifteen days. A supplementary term of an equal number of days shall, however, be granted to them as well for evacuating the fortresses and withdrawing the provisions and material of war, as for drawing up the inventory of the implements and objects which cannot be removed at once.

Article XLII.

As Servia is to bear a portion of the Ottoman Public debt for the new territories assigned to her by the present Treaty, the Representatives at Constantinople shall fix the amount of it in concert with the Sublime Porte on an equitable basis.

Article XLIII.

The High Contracting Parties recognize the independence of Roumania, subject to the conditions set forth in the two following articles.

Article XLIV.

In Roumania the difference of religious creeds and confessions shall not be alleged against any person as a ground for exclusion or incapacity in matters relating to the enjoyment of civil and political rights, admission to public employments, functions, and honours, or the exercise of the various professions and industries in any locality whatsoever.

The freedom and outward exercise of all forms of worship shall be assured to all persons belonging to the Roumanian State, as well as to foreigners, and no hindrance shall be offered either to the hierarchical organization of the different communions, or to their relations with their spiritual chiefs.

The subjects and citizens of all the Powers, traders or others, shall be treated in Roumania, without distinction of creed, on a footing of perfect equality.

Article XLV.

The Principality of Roumania restores to His Majesty the Emperor of Russia that portion of the Bessarabian territory detached from Russia by the Treaty of Paris of 1856, bounded on the west by the mid-

channel of the Pruth, and on the south by the mid-channel of the Kilia Branch and the Stary-Stamboul mouth.

Article XLVI.

The islands forming the Delta of the Danube, as well as the Isle of Serpents, the Sandjak of Toultcha, comprising the districts (cazas) of Kilia, Soulina Mahmoudié, Isaktcha, Toultcha, Matchin, Babadagh, Hirsovo, Kustendje, Medjidié, are added to Roumania. The Principality receives in addition the territory situated to the south of the Dobroutcha as far as a line starting from the east of Silistria and terminating on the Black Sea south of Mangalia.

The frontier line shall be determined on the spot by the European Commission appointed for the delimitation of Bulgaria.

Article XLVII.

The question of the division of the waters and the fisheries shall be submitted to the arbitration of the European Commission of the Danube.

Article XLVIII.

No transit duties shall be levied in Roumania on goods passing through the Principality.

Article XLIX.

Roumania shall have power to make Conventions to determine the privileges and attributes of Consuls in regard to protection within the Principality. Existing rights shall remain in force so long as they shall not have been modified by the mutual consent of the Principality and the parties concerned.

Article L.

Until the conclusion of a Treaty between Turkey and Roumania, fixing the privileges and attributes of Consuls, Roumanian subjects travelling or residing in the Ottoman Empire, and Ottoman subjects travelling or residing in Roumania, shall enjoy the rights guaranteed to the subjects of other European Powers.

Article LI.

With regard to public works and other enterprises of a like nature, Roumania shall be substituted for the Sublime Porte as regards its rights and obligations throughout the ceded territory.

Article LII.

In order to increase the guarantees which assure the freedom of navigation on the Danube which is recognized as of European interest, the High Contracting Parties determine that all the fortresses and fortifications existing on the course of the river from the Iron Gates to its mouths shall be razed, and no new ones erected. No vessel of war shall navigate the Danube below the Iron Gates with the exception of vessels of light tonnage in the service of the river police and

Customs. The "stationnaires" of the Powers at the mouths of the Danube may, however, ascend the river as far as Galatz.

Article LIII.

The European Commission of the Danube on which Roumania shall be represented is maintained in its functions, and shall exercise them henceforth as far as Galatz in complete independence of the territorial authorities. All the Treaties, arrangements, acts, and decisions relating to its rights, privileges, prerogatives, and obligations are confirmed.

Article LIV.

One year before the expiration of the term assigned for the duration of the European Commission the Powers shall come to an understanding as to the prolongation of its powers, or the modifications which they may consider necessary to introduce.

Article LV.

The regulations respecting navigation, river police, and supervision from the Iron Gates to Galatz shall be drawn up by the European Commission, assisted by Delegates of the Riverain States, and placed in harmony with those which have been or may be issued for the portion of the river below Galatz.

Article LVI.

The European Commission of the Danube shall come to an arrangement with the proper authorities to ensure the maintenance of the lighthouse on the Isle of Serpents.

Article LVII.

The execution of the works which have for their object the removal of the obstacles which the Iron Gates and the Cataracts place in the way of navigation is entrusted to Austria-Hungary. The Riverain States on this part of the river shall afford every facility which may be required in the interest of the works.

The provisions of the VIth Article of the Treaty of London of the 13th March, 1871, relating to the right of levying a provisional tax in order to cover the cost of these works, are maintained in favour of Austria-Hungary.

Article LVIII.

The Sublime Porte cedes to the Russian Empire in Asia the territories of Ardahan, Kars, and Batoum, together with the latter port, as well as all the territories comprised between the former Russo-Turkish frontier and the following line :—

The new frontier starting from the Black Sea, and coinciding with the line laid down by the Treaty of San Stefano as far as a point to the north-west of Khorda, and to the south of Artwin, continues in a straight line as far as the River Tchoroukh, crosses this river and passes to the east of Aschmichen, going in a straight line to the south so as to rejoin the Russian frontier indicated in the Treaty of San Stefano, at a point to the south of Nariman, leaving the town of Olti

to Russia. From the point indicated near Nariman the frontier turns to the east, passes by Tebrenec, which remains to Russia, and continues as far as the Pennek Tschaï.

It follows this river as far as Bardouz, then turns towards the south, leaving Bardouz and Jönikioy to Russia. From a point to the west of the village of Karaougan, the frontier takes the direction of Medjingert, continues in a straight line towards the summit of the Mountain Kassadagh, and follows the line of the watershed between the affluents of the Araxes on the north and those of the Mourad Sou on the south, as far as the former frontier of Russia.

Article LIX.

His Majesty the Emperor of Russia declares that it is his intention to constitute Batoum a free port, essentially commercial.

Article LX.

The valley of Alaschkerd and the town of Bayazid, ceded to Russia by Article XIX. of the Treaty of San Stefano, are restored to Turkey.

The Sublime Porte cedes to Persia the town and territory of Khotour, as fixed by the mixed Anglo-Russian Commission for the delimitation of the frontiers of Turkey and of Persia.

Article XLI.

The Sublime Porte undertakes to carry out, without further delay, the improvements and reforms demanded by local requirements in the provinces inhabited by the Armenians, and to guarantee their security against the Circassians and Kurds.

It will periodically make known the steps taken to this effect to the Powers, who will superintend their application.

Article LXII.

The Sublime Porte having expressed the intention to maintain the principle of religious liberty, and give it the widest scope, the Contracting Parties take note of this spontaneous declaration.

In no part of the Ottoman Empire shall difference of religion be alleged against any person as a ground for exclusion or incapacity as regards the discharge of civil and political rights, admission to the public employments, functions and honours, or the exercise of the various professions and industries.

All persons shall be admitted, without distinction of religion, to give evidence before the tribunals.

The freedom and outward exercise of all forms of worship are assured to all, and no hindrance shall be offered either to the hierarchical organization of the various communions or to their relations with their spiritual chiefs.

Ecclesiastics, pilgrims, and monks of all nationalities travelling in Turkey in Europe, or in Turkey in Asia, shall enjoy the same rights, advantages, and privileges.

The right of official protection by the Diplomatic and Consular Agents of the Powers in Turkey is recognized both as regards the above-

mentioned persons and their religious, charitable, and other establishments in the Holy Places and elsewhere.

The rights possessed by France are expressly reserved, and it is well understood that no alterations can be made in the *status quo* in the Holy Places.

The monks of Mount Athos, of whatever country they may be natives, shall be maintained in their former possessions and advantages, and shall enjoy, without any exception, complete equality of rights and prerogatives.

Article LXIII.

The Treaty of Paris of March 30, 1856, as well as the Treaty of London of March 13, 1871, are maintained in all such of their provisions as are not abrogated or modified by the preceding stipulations.

Article LXIV.

The present Treaty shall be ratified, and the ratifications exchanged at Berlin within three weeks, or sooner if possible.

In faith whereof the respective Plenipotentiaries have signed it, and affixed to it the seal of their arms.

Done at Berlin, the thirteenth day of the month of July, one thousand eight hundred and seventy-eight.

[L.S.]	Signed	Beaconsfield.
[L.S.]		Salisbury.
[L.S.]		Odo Russell.
[L.S.]		v. Bismarck.
[L.S.]		Bülow.
[L.S.]		Hohenlohe.
[L.S.]		Andrássy.
[L.S.]		Károlyi.
[L.S.]		Haymerle.
[L.S.]		Waddington.
[L.S.]		Saint-Vallier.
[L.S.]		H. Desprez.
[L.S.]		L. Corti.
[L.S.]		Launay.
[L.S.]		Gortchakow.
[L.S.]		Schouvaloff.
[L.S.]		P. d'Oubril.
[L.S.]		Al. Carathéodory.
[L.S.]		Mehemed Ali.
[L.S.]		Sadoullah.

ANGLO-TURKISH CONVENTION.

16. *Convention of Defensive Alliance between Great Britain and Turkey, signed June* 4, 1878.

HER Majesty the Queen of the United Kingdom of Great Britain and Ireland, Empress of India, and His Imperial Majesty the Sultan, being mutually animated with the sincere desire of extending and strengthening the relations of friendship happily existing between their two Empires, have resolved upon the conclusion of a Convention of defensive alliance with the object of securing for the future the territories in Asia of His Imperial Majesty the Sultan.

Their Majesties have accordingly chosen and named as their Plenipotentiaries, that is to say:—

Her Majesty the Queen of the United Kingdom of Great Britain and Ireland, Empress of India, the Right Honourable Austen Henry Layard, Her Majesty's Ambassador Extraordinary and Minister Plenipotentiary at the Sublime Porte;

And His Imperial Majesty the Sultan, his Excellency Safvet Pasha, Minister for Foreign Affairs of His Imperial Majesty;

Who, after having exchanged their full powers, found in due and good form, have agreed upon the following Articles:—

ARTICLE I.

If Batoum, Ardahan, Kars, or any of them, shall be retained by Russia, and if any attempt shall be made at any future time by Russia to take possession of any further territories of His Imperial Majesty the Sultan in Asia, as fixed by the Definitive Treaty of Peace, England engages to join His Imperial Majesty the Sultan in defending them by force of arms.

In return, His Imperial Majesty the Sultan promises to England to introduce necessary reforms, to be agreed upon later between the two Powers, into the government, and for the protection, of the Christian and other subjects of the Porte in these territories; and in order to enable England to make necessary provision for executing her engagement, His Imperial Majesty the Sultan further consents to assign the Island of Cyprus to be occupied and administered by England.

ARTICLE II.

The present Convention shall be ratified, and the ratifications thereof shall be exchanged, within the space of one month, or sooner if possible.

In witness whereof the respective Plenipotentiaries have signed the same, and have affixed thereto the seal of their arms.

Done at Constantinople, the fourth day of June, in the year one thousand eight hundred and seventy-eight.

[L.S.] A. H. LAYARD.
[L.S.] SAFVET.

Annex.

It is understood between the two High Contracting Parties that England agrees to the following conditions relating to her occupation and administration of the Island of Cyprus:—

I. That a Mussulman religious Tribunal (Mehkéméi Shéri) shall continue to exist in the island, which will take exclusive cognizance of religious matters, and of no others, concerning the Mussulman population of the island.

II. That a Mussulman resident in the island shall be named by the Board of Pious Foundations in Turkey (Evkraf) to superintend, in conjunction with a Delegate to be appointed by the British Authorities, the administration of the property, funds, and lands belonging to mosques, cemeteries, Mussulman schools, and other religious establishments existing in Cyprus.

III. That England will pay to the Porte whatever is the present excess of revenue over expenditure in the island; this excess to be calculated upon and determined by the average of the last five years, stated to be 22,936 purses, to be duly verified hereafter, and to the exclusion of the produce of State and Crown lands let or sold during that period.

IV. That the Sublime Porte may freely sell and lease lands and other property in Cyprus belonging to the Ottoman Crown and State (Arazii Miriyé vé Emlaki Houmayoun), the produce of which does not form part of the revenue of the island referred to in Article III.

V. That the English Government, through their competent authorities, may purchase compulsorily, at a fair price, land required for public improvements, or for other public purposes, and land which is not cultivated.

VI. That if Russia restores to Turkey Kars and the other conquests made by her in Armenia during the last war, the Island of Cyprus will be evacuated by England, and the Convention of the 4th of June, 1878, will be at an end.

Done at Constantinople, the 1st day of July, 1878.

(Signed) A. H. LAYARD.
SAFVET.

APPENDIX G.

DECLARATION OF PARIS.

Declaration signed by the Plenipotentiaries of Great Britain, Austria, France, Prussia, Russia, Sardinia, and Turkey respecting Maritime Law. Paris, 15th April, 1856.

THE Plenipotentiaries who signed the Treaty of Paris of the 30th March, 1856, assembled in Conference,—

Considering:

That Maritime Law, in time of war, has long been the subject of deplorable disputes;

That the uncertainty of the law, and of the duties in such a matter, gives rise to differences of opinion between neutrals and belligerents which may occasion serious difficulties, and even conflicts;

That it is consequently advantageous to establish a uniform doctrine on so important a point;

That the Plenipotentiaries assembled at Paris cannot better respond to the intentions by which their Governments are animated than by seeking to introduce into international relations fixed principles in this respect;

The above-mentioned Plenipotentiaries being duly authorised resolved to concert among themselves as to the means of attaining this object; and having come to an agreement, have adopted the following solemn Declaration:—

1. Privateering is, and remains abolished;
2. The Neutral Flag covers Enemy's Goods, with the exception of Contraband of War;
3. Neutral Goods, with the exception of Contraband of War, are not liable to capture under Enemy's flag;
4. Blockades, in order to be binding, must be effective, that is to say, maintained by a force sufficient really to prevent access to the coast of the enemy.

The Governments of the undersigned Plenipotentiaries engage to bring the present Declaration to the knowledge of the States which have not taken part in the Congress of Paris, and to invite them to accede to it.

Convinced that the maxims which they now proclaim cannot but be received with gratitude by the whole world, the undersigned Plenipotentiaries doubt not that the efforts of their Governments to obtain the general adoption thereof, will be crowned with full success.

The present Declaration is not and shall not be binding, except between those Powers who have acceded, or shall accede to it.

Done at Paris, 16th April, 1856.

APPENDIX H.

TERRITORIAL WATERS JURISDICTION ACT, 1878.

41 & 42 VICT. CHAP. 73.

An Act to regulate the Law relating to the Trial of Offences committed on the Sea within a certain distance of the Coasts of Her Majesty's Dominions. [16*th August*, 1878.]

WHEREAS the rightful jurisdiction of Her Majesty, her heirs and successors, extends and has always extended over the open seas adjacent to the coasts of the United Kingdom and of all other parts of Her Majesty's dominions to such a distance as is necessary for the defence and security of such dominions;

And whereas it is expedient that all offences committed on the open sea within a certain distance of the coasts of the United Kingdom and of all other parts of Her Majesty's dominions, by whomsoever committed, should be dealt with according to law:

Be it therefore enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

1. This Act may be cited as the Territorial Waters Jurisdiction Act, 1878. Short title.

2. An offence committed by a person, whether he is or is not a subject of Her Majesty, on the open sea within the territorial waters of Her Majesty's dominions, is an offence within the jurisdiction of the Admiral, although it may have been committed on board or by means of a foreign ship, and the person who committed such offence may be arrested, tried, and punished accordingly. Amendment of the law as to the jurisdiction of the Admiral.

3. Proceedings for the trial and punishment of a person who is not a subject of Her Majesty, and who is charged with any such offence as is declared by this Act to be within the jurisdiction of the Admiral, shall not be instituted in any court of the United Kingdom, except with the consent of one of Her Majesty's Principal Secretaries of State, and on his certificate that the institution of such proceedings is in his opinion expedient, and shall not be instituted in any of the dominions of Her Majesty out of the United Kingdom, except with the leave of the Governor of the part of the dominions in which such proceedings are proposed to be instituted, and on his certificate that it is expedient that such proceedings should be instituted. Restriction on introduction of proceedings for punishment of offence.

4. On the trial of any person who is not a subject of Her Majesty for an offence declared by this Act to be within the jurisdiction of the Admiral, it shall not be necessary to aver in any indictment or infor- Provisions as to procedure.

mation on such trial that such consent or certificate of the Secretary of State or Governor as is required by this Act has been given, and the fact of the same having been given shall be presumed unless disputed by the defendant at the trial; and the production of a document purporting to be signed by one of Her Majesty's Principal Secretaries of State as respects the United Kingdom, and by the Governor as respects any other part of Her Majesty's dominions, and containing such consent and certificate, shall be sufficient evidence for all the purposes of this Act of the consent and certificate required by this Act.

Proceedings before a justice of the peace or other magistrate previous to the committal of an offender for trial or to the determination of the justice or magistrate that the offender is to be put upon his trial shall not be deemed proceedings for the trial of the offence committed by such offender for the purposes of the said consent and certificate under this Act.

Saving as to jurisdiction.

5. Nothing in this Act contained shall be construed to be in derogation of any rightful jurisdiction of Her Majesty, her heirs or successors, under the law of nations, or to affect or prejudice any jurisdiction conferred by Act of Parliament or now by law existing in relation to foreign ships or in relation to persons on board such ships.

Saving as to piracy.

6. This Act shall not prejudice or affect the trial in manner heretofore in use of any act of piracy as defined by the law of nations, or affect or prejudice any law relating thereto; and where any act of piracy as defined by the law of nations is also any such offence as is declared by this Act to be within the jurisdiction of the Admiral, such offence may be tried in pursuance of this Act, or in pursuance of any other Act of Parliament, law, or custom relating thereto.

Definitions.

7. In this Act, unless there is something inconsistent in the context, the following expressions shall respectively have the meanings hereinafter assigned to them; that is to say,

"Jurisdiction of the Admiral:"

"The jurisdiction of the Admiral," as used in this Act, includes the jurisdiction of the Admiralty of England and Ireland, or either of such jurisdictions as used in any Act of Parliament; and for the purpose of arresting any person charged with an offence declared by this Act to be within the jurisdiction of the Admiral, the territorial waters adjacent to the United Kingdom, or any other part of Her Majesty's dominions, shall be deemed to be within the jurisdiction of any judge, magistrate, or officer having power within such United Kingdom, or other part of Her Majesty's dominions, to issue warrants for arresting or to arrest persons charged with offences committed within the jurisdiction of such judge, magistrate, or officer:

"United Kingdom:"

"United Kingdom" includes the Isle of Man, the Channel Islands, and other adjacent islands:

"Territorial waters of Her Majesty's dominions:"

"The territorial waters of Her Majesty's dominions," in reference to the sea, means such part of the sea adjacent to the coast of the United Kingdom, or the coast of some other part of Her Majesty's dominions, as is deemed by international law to be within the territorial sovereignty of Her Majesty; and for the

purpose of any offence declared by this Act to be within the jurisdiction of the Admiral, any part of the open sea within one marine league of the coast measured from low-water mark shall be deemed to be open sea within the territorial waters of Her Majesty's dominions:

"Governor," as respects India, means the Governor General or the Governor of any presidency; and where a British possession consists of several constituent colonies, means the Governor General of the whole possession or the Governor of any of the constituent colonies; and as respects any other British possession, means the officer for the time being administering the government of such possession; also any person acting for or in the capacity of Governor shall be included under the term "Governor:" "Governor:"

"Offence" as used in this Act means an an act, neglect, or default of such a description as would, if committed within the body of a county in England, be punishable on indictment according to the law of England for the time being in force: "Offence:"

"Ship" includes every description of ship, boat, or other floating craft: "Ship:"

"Foreign ship" means any ship which is not a British ship. "Foreign ship."

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